SCOPE OF APPELLATE REVIEW OF RECORDS OF TRIAL

Edmund Burke, Jr.

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SCOPE

An analysis of the authorized scope of review of court-martial records of trial by the convening authority, boards of review, and the United States Court of Military Appeals; limitations on scope of review; consideration of matters dehors the record, including the application of the principle of jurisdictional notice and policies which may and may not be considered.

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CHAPTER I.

INTRODUCTION

The system of military justice by which the Armed Forces of the United States are governed provides the individual, accused of having committed an offense, greater protection than any other system of criminal jurisprudence. Only those aspects of this system which pertain to the review of court-martial records, including appellate review, will be examined in detail. Other aspects of the system will be given cursory consideration as they bear upon the evolution of the system itself. The automatic reviews, and those which are nearly automatic or appellate by nature, contribute in no small measure to the fairness of the system as a whole. Too frequently the rights and privileges of the individual are believed to be in opposition to, or in conflict with, those of the Government. The interests of the Government will, therefore, be considered. The concept of military justice, to be used throughout, purports to treat the interests of the individual and of the Government as being of equal importance and probably interchangeable.

Throughout the history of this nation, the Armed Forces which have been brought to being in times of crises have been composed largely of civilians as distinguished from the professional or career militarist. Approximately 11,454,000 of the 12,124,418 persons serving in the Armed Forces at the personnel peak of

World War II, for example, entered the military service directly from civilian life. These figures differ from past wars only in total numbers. The lives of these civilians were governed by military justice during the period of their service. In turn, the lives and well being of thousands of their dependents at home were affected thereby. Many of these civilian soldiers and sailors became active leaders in the civic and political affairs of the communities to which they returned. Many such leaders will be found today actively participating in various organizations, veterans groups, state legislative bodies, and in the halls of Congress. It is little wonder, therefore, that a very pronounced civilian influence has always exerted itself upon the military affairs of this country and specifically upon military justice.

It is upon this premise that considerable effort has been devoted herein in tracing the origin and over-all development of the military system as it exists today. An understanding of the basic concepts upon which this system of military justice is founded will better enable the civilian lawyer to represent his clients with a fuller appreciation of the privileges extended to military personnel. Such an understanding will aid the student of the law in his exploration of a field of law long ignored or paid little mind by legal scholars, yet vital to the military and large segments of the population. It should guide the military lawyer toward a recognition and preservation of the heritages of

antiquity by which discipline, so essential to the maintenance of an armed force, is exercised with justice for all who compose that force.

The Uniform Code of Military Justice for the government of the Armed Forces of the United States unified, consolidated, revised, and codified the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, thereby placing all of the military services under one law. This Act was approved by the Congress on 5 May 1950 and became effective 31 May 1951. By Executive Order 10214, executed by President Harry S. Truman on 8 February 1951, the Manual for Courts-Martial, United States, 1951, came into full force and effect on 31 May 1951. Under the provisions of the Act, the Armed Forces were deemed to include the Army, the Navy, the Air Force, and, except when operating as a part of the Navy, the Coast Guard. The Marine Corps was included within the Navy, as was the Coast Guard when operating as a part of the Navy. Personnel of the Coast and Geodetic Survey, Public Health Service, and other organizations, when assigned to and serving with the Armed Forces of the United States, and others were included within the Act. This inquiry will, therefore, look primarily to the provisions of the Uniform Code of Military Justice and to the provisions of Manual for Courts-Martial, United States, 1951, as primary sources of the existing system of military justice. As to the interpretations which have been given to these provisions,

reference will only be made to the decisions of the United States Court of Military Appeals.

The present inquiry will be confined to the authorized scope of review of court-martial trial records by the convening authority, boards of review, and the United States Court of Military Appeals, together with the limitations thereon. Jurisdictional matters in general, pretrial and trial procedures, collateral attack by the judiciary, and other remedial procedures are not encompassed within this inquiry. The substantive law, upon which specific or prejudicial error is predicated and subtle distinctions between matters of fact and matters of law will be avoided so far as possible. No effort will be made to compare specific details of the military system with those which exist in civilian criminal practice. Particular attention will be directed to limitations upon the scope of review and to matters, if any, which may be considered if arising from sources outside the record. Finally, consideration will be given to the use to which judicial knowledge may be put by reviewing authorities.

CHAPTER II.

HISTORICAL BACKGROUND--MILITARY JUSTICE

POST WORLD WAR II--DEVELOPMENTS.

U. S. Army.

During World War I, 4,355,000 men were called into the Armed Forces of the United States. The expansion of the military in World War II reached far greater proportions, and 12,300,000 men were brought under arms. More than 11,000 lawyers served in the Navy during World War II; the proportion would have been similar in the other services. The outbreak of the Korean Conflict saw our forces brought up to about 5,720,000 men.[1] Educational programs available to veterans greatly expanded the law school populations. The natural outgrowth of so many people's lives being directly affected by the military, so many of whom were lawyers, has been a vastly expanded interest in the field of military justice. The continued maintenance of our largest peacetime Military Establishment has perpetuated this interest.

Plans for a permanent Military Establishment were being formulated at about the time that a demobilization of World War II forces reached completion. Secretary of War, Patterson, met with Mr. Willis Smith, President of the American Bar Association, and requested that members of the Association be selected to serve on the War Department Advisory Committee on Military Justice. The

[1] 1957 World Almanac; and Blanstein--Porter, The American Lawyer, p. 117.

Committee was created on 25 March 1946 with Mr. Arthur T. Vanderbilt as chairman. Other recognized leaders of the legal profession who served with him were: Judge Alexander Holtzoff, Walter P. Armstrong, Joseph W. Henderson, William T. Joyner, Honorable Frederick E. Crane, Jacob M. Lashly, Judge Morris A. Soper, and Floyd E. Thompson.[2]

The report of this Committee was submitted on 13 December 1946 after months of study and research. It was thereafter subjected to thorough study and consideration within the War Department by the Office of the Chief of Staff and others. The Committee on Military Affairs of the House of Representatives, 79th Congress, also made a report on the judicial system of the Army at about the same time.[3] Honorable Kenneth C. Royall, then the Under Secretary of War, was charged with the general supervision of military justice and clemency,[4] the actual administration being the responsibility of The Judge Advocate General.[5] In accordance with these studies and the resultant suggestions based upon them, the Under Secretary determined which changes the War Department thought necessary or advisable, and this determination was approved by the Secretary of War.[6]

[2] Royall, Revision of the Military Justice Process, 33 Va. L. Rev. 269 (1947).
[3] H. R. Rep. No. 2722, 79th Cong., 2d Sess. (1946).
[4] 5 U.S.C. 181a (1940). "The Undersecretary of War shall perform such duties as may be prescribed by the Secretary of War or required by law. ..."
[5] Royall, op. cit., fn. 2.
[6] Ibid., 271.

Two identical bills were separately introduced into the United States Senate and the House of Representatives for the purpose of accomplishing the legislative action necessary to bring about the desired changes.[7] The House of Representatives, after lengthy hearings, passed H. R. 2575, revising the Army court-martial system, but no hearings were held on the companion bill in the Senate. Toward the end of the 80th Congress, the bill revising the Army system, as passed by the House of Representatives, and known as the Elston Act, was included as an amendment to the Selective Service Act of 1948 during Senate debate and subsequently became Public Law 759, 80th Congress.[8] The Navy Department had submitted proposed legislation early in the 80th Congress, but in view of the controversial issues involved and besetting Congress regarding the proposed changes in the two existing systems of military justice, no action was taken on the Navy proposals.

It was during this same session of Congress that the National Security Act of 1947[9] was enacted, unifying the armed services and creating a separate Department of the Air Force effective 18 September 1947. Since there were such wide differences between the proposed Army and Navy systems and in order to avoid the

[7] S. 903, 80th Cong., 1st Sess. (1947) and H. R. 2575, 80th Cong., 1st Sess. (1947).

[8] 62 Stat. 627, Act of June 24, 1948. 62 Stat. at Large, Ch. 625, Sect. 201, 80th Cong., 2d Sess. (1848), 10 U.S.C. 1472 et seq.; U. S. Cong. Ser., 81st Cong., 2d Sess. (1950) Leg. Hist. 2225.

[9] Act of 26 July 1947 (c. 343, 61 Stat. 495).

establishment of a third distinct system, Secretary of Defense James Forrestal in July 1948 appointed a special committee to draft a Uniform Code of Military Justice which would be equally applicable to all of the Armed Forces. Professor Edmund Morgan, Jr., of the Harvard Law School, was designated chairman, the other members of the committee being: Assistant Secretary of the Army, Gordon Gray, Under Secretary of the Navy, John Kenney, and Assistant Secretary of the Air Force, Eugene Zukert. Supplementing the efforts of the main committee was a working group of approximately fifteen persons, including officer representatives of each of the services and five civilian lawyers under the chairmanship of Mr. Felix Larkin, Assistant General Counsel in the Office of the Secretary of Defense. After some seven months of study, the combined efforts were S. 857, presented to the Senate, and a companion bill, H. R. 4080.[10] This Act has become known as the "Uniform Code of Military Justice."[11]

U. S. Navy.

A very similar development had been taking place in the Navy. At the request of the Secretary of the Navy, a committee, headed

[10] U. S. Cong. Ser., 81st Cong., 2d Sess. (1950) Leg. Hist. 2225.

[11] UCMJ, Act of May 5, 1950, 64 Stat. 108 (50 U.S.C. 551-736). Codified and enacted into law as Title 10 of the United States Code, entitled "Armed Forces," Act of August 10, 1956 (Pub. Law 1028, c. 1041, 84th Cong., 70A Stat. 36). NOTE: Corresponding sections of Title 10 may be found by adding 800 to the specific Article of the Uniform Code of Military Justice. By way of example, Art. 1, UCMJ, has been codified as 10 U.S.C. 801. (Hereafter referred to as the "Code" and in subsequent footnotes as UCMJ.)

by Mr. Arthur A. Ballantine, New York attorney and former Under Secretary of the Treasury, submitted its first report in 1943 followed by a second report in 1946.[12] Other members of the Ballantine Committee were: Professor Noel T. Dowling, Columbia Law School; Honorable Matthew F. McGuire; Major General Thomas E. Watson, USMC; Rear Admiral George L. Russell, USN (Assistant Judge Advocate General of the Navy); Rear Admiral John E. Gingrich, USN; Rear Admiral George C. Dyer, USN; Captain Leon H. Movine, USCG; Lieutenant Commander Richard L. Tedrow, USNR; and Lieutenant John J. Finn, USNR. A complete revision of the Articles for the Government of the Navy was recommended by another committee, reporting in 1945. This committee was headed by the Honorable Matthew F. McGuire, U. S. District Judge, D. C.; other members being the Honorable Alexander Holtzoff, U. S. District Judge, D. C.; and Colonel James M. Snedeker, USMC.[13] Father Robert J. White, Dean of Catholic University Law School, Rear Admiral, USNR (Ret.), made recommendations for changes in the Navy court-martial system as a result of several studies undertaken by him.[14] Another comprehensive report recommending numerous changes in the naval system was submitted by the General Court-Martial Sentence Review Board, headed by Professor Arthur-John Keeffe, Cornell Law School.[15]

[12] Report of Ballantine Comm. to the Sec'y of the Navy (Sep 1943); Report Ballantine Comm. to the Sec'y of the Navy (Apr 1946).

[13] Report of the McGuire Comm. to the Sec'y of the Navy (Nov 1945).

[14] White, A Study of 500 Naval Prisoners and Naval Justice (Jan 1947).

[15] Report of the General Court-Martial Sentence Review Board to the Sec'y of the Navy (Jan 1947).

Other members serving on this board were: Felix E. Larkin, Vice-President; Admiral C. P. Snyder, USN; Captain Hunter Wood, Jr., USN; Captain John A. Glynn, USCG; Captain Clifford B. Hines, USN; Lieutenant Colonel E. N. Murray, USMC; and Commander A. W. Dickinson, USNR. Based upon the foregoing reports and independent studies within the Navy Department, a proposed bill for the amendment and revision of the Articles for the Government of the Navy was introduced in Congress.[16] Action upon this proposed legislation was held in abeyance, as mentioned above, pending results of the committee appointed by the Secretary of Defense.

MILITARY LAW.

Origin--In U. S. Navy.

In attempting to make an analysis of the scope of reviews authorized by the Code, it may prove profitable that some attention be given to the historical background out of which the present system has evolved. The interest and activity, attendant upon the enactment of the Code, evoked considerable controversy and commensurate publicity. There has, therefore, been some tendency toward a popular notion that military justice is something of very recent origin. Such is not the truth. Turning back the pages of history, the source and common ancestor of military and naval codes will probably be found in The Ordinance of Richard I, dated 1190,[17]

[16] S. 1338 (starred version), H. R. 3687, both 80th Cong., 1st Sess. (1947).

[17] Reprinted in Winthrop, Military Law and Precedents, 903 (1895 ed., 1920 reprint).

which applied to soldiers as well as to sailors. The Black Book of the Admiralty[18] may be considered to be the first code specifically applicable to the British Navy.[19] It appears that the Ordinance and Articles of Martial Law for the Government of the Navy, 1645, was the first statutory authority for naval courts-martial.[20] Cromwell's Articles, first enacted in 1649 and amended in 1652, became the original statutory provisions for the general government of the Navy. They contained what had been the naval law in practice and were to remain the basic naval law until 1749 when a new code was enacted. The Articles of 1749 differed very little from Cromwell's Articles and were in force at the time of the American Revolution.[21]

John Adams compiled the first articles for use in the American Navy by selecting suitable provisions from the British Articles of 1749. His work was approved on 28 November 1775 by the Continental Congress and became the Rules for the Regulation of the Navy of the United Colonies. The wisdom and good judgment of such men as John Adams is aptly demonstrated by the fact that these Rules provided regulation for the U. S. Navy with minor modification until 1862 when the Articles for the Government of the United States Navy were enacted by Congress.[22] Forty-five

[18] Edited by Sir Travers Twiss, Republished in 1871 with historical introduction.

[19] Holdsworth, History of English Law, 125 et seq (3d ed., 1922).

[20] Lovette, Naval Customs, Traditions and Usages, p. 66 (3d ed., 1939).

[21] Pasley and Larkin, The Navy Court-Martial: Proposals for Its Reform, 33 Cornell L.Q. 195, 197.

[22] Rev. Stat. Sec. 1624 (1875), 34 U.S.C.A. 591 (1928).

articles were added between 1862 and the repeal of the articles by the enactment of the Uniform Code of Military Justice, which became effective on 31 May 1951. It may be stated in all fairness that Cromwell's Articles of 1649 served a useful purpose for more than three hundred years.

Origin--In U. S. Army--To World War I.

Lieutenant Colonel Waldemar A. Solf, USA, the author of Chapter XX, Legal and Legislative Basis, MCM, 1951, p. 146, points out that a Committee of the Continental Congress composed of John Adams, Thomas Jefferson, John Rutledge, James Wilson, and R. R. Livingston patterned a set of Articles of War, in 1776, upon the British Articles. He quotes from the autobiography of John Adams[23] in part as follows:

> "This report was made by me and Mr. Jefferson, in consequence of a letter from General Washington, sent by Colonel Tudor, Judge Advocate General, representing the insufficiency of the Articles of War, and requesting a revision of them. Mr. John Adams and Mr. Jefferson were appointed a committee to hear Tudor, and revise the Articles. It was a very difficult and unpopular subject, and I observed to Jefferson, that whatever alteration we should report with the least energy in it, or the least tendency to a necessary discipline of the Army, would be opposed with as much vehemence, as if it were the most perfect; we might as well, therefore, report a complete system at once, and let it meet its fate. Something perhaps might be gained. There was extant one system of articles of war which had carried two empires to the head of mankind, the Roman and the British; for the British Articles of War were only a literal translation of the Roman. It would be vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline. It was an observation founded in the

[23] Works of John Adams, Vol. III, pp. 68-69, Autobiography, Monday, August 19, 1776.

> undoubted facts, that the prosperity of nationshad been in proportion to the discipline of their forces by sea and land; I was, therefore, for reporting the British Articles of War, tatidem verbis. Jefferson, in those days, never failed to agree with me, in everything of a political nature, and he very courteously concurred in this. The British Articles of War were, accordingly, reported, and defended in Congress by me assisted by some others, and finally carried. That laid the foundation of a discipline which, in time, brought our troops to a capacity of contending with British veterans, and a rivalry with the best troops of France."

It is of considerable interest that prior to the adoption of the British Articles, the second Continental Congress, on 30 June 1775, had adopted a set of articles prepared by a committee, consisting of George Washington, Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes. Some of their articles were taken from the British Code, but others were taken from the Massachusetts Articles of 5 April 1775 which probably constituted the first American written code of military laws.[24] The Code of 1776 assembled the articles into the form and arrangement of the British Articles. The background of the British Articles, though not of course identical, did very closely follow the general pattern and trends from common ancestral Ordinance of Richard I of 1190.[25] It is of passing interest at this point to note that at the time of the American Revolution in 1776, the Armies and Navies of both sides were conducting warfare under the same articles. It is of greater import that notice be given to the fact that those who were later to take an active part in drafting the Constitution of the United States were well aware of the systems of military law

[24] Winthrop, Military Law and Precedents, pp. 21-22 (1895 ed., 1920 reprint).

[25] Ibid, 903.

under which the Army and the Navy were functioning at the time of its adoption. Based upon this historical background, Colonel Winthrop in considering the powers of Congress under the Constitution of the United States[26] and those of the President as the Executive power[27] very neatly and concisely stated:[28]

> "The provisions of the Constitution which may be regarded as the source or sanction of, or authority for, our existing military law and jurisdiction--the discipline of armies as well as the war power--are ..."

He then pointed to the provisions of Article I, Section 8, and Article II, Sections 1, 2, and 3. Constitutional recognition of then existing military law, together with authorizations noted, has led to the rationale that courts-martial are not a part of the judiciary of the United States but a part of the Executive Branch of the Government. From this foundation is also derived the proposition that the proceedings, findings, and sentences of courts-martial are not subject to judicial revision or appeal.[29] It is recognized that there have been many cases involving certiorari, writs of error, prohibition, mandamus, and habeas corpus.[30] Many of those cases are, to be sure, within highly controversial areas but of a nature beyond the present scope of inquiry and not directly related to it.

[26] U. S. Const., Art. I, Sec. 8.
[27] U. S. Const., Art. II, Secs. 1, 2, and 3.
[28] Winthrop, Military Law and Precedents, p. 16 (1895 ed., 1920 reprint). It is significant that the Fifth Amendment to the Constitution was not considered as a source of power at this time.
[29] E. g., Dynes v. Hoover, 20 How. 65 (1858).
[30] Winthrop, Military Law and Precedents, pp. 50-51 (1895 ed. 1920 reprint). Also Snedeker, Habeas Corpus and Court-Martial Prisoners, 6 Vanderbilt L. Rev. 288 (1953).

Returning to the pre-World War evolution of military law in the Army, the 1776 Articles were amended in May of 1786. The Constitution was adopted on 17 September 1787. Requiring ratification by nine states, the Constitution became effective on 4 March 1789 with a ratification by eleven states. The First Congress, by an act of 29 September 1789, adopted the Articles of 1786 for the existing army. These articles remained substantially as they were until the enactment of a new code on 10 April 1806, which contained one hundred and one articles with an additional provision for the punishment of spys. With but minor amendments, this code remained in effect until the Enactment of 22 June 1874 (Rev. Sts. Sec. 1342 and 1343). Further amendments were made in 1890 by the creation of the summary court[31] in 1892[32] and 1895.[33] Little change took place thereafter until World War I.

Ansell Influence.

In 1918, General Samuel T. Ansell expressed legal views which came into such sharp conflict with War Department interpretations and those of the Chief of Staff as to require submission of the matter to then Secretary of War, Baker. General Ansell's position in the field of law bears a striking resemblance to that of the famous Billy Mitchell in the field of aviation. General Ansell sunk no battleships, found little popular support, and today his

[31] Act of October 1, 1890, 26 Stat. 648.
[32] Act of July 27, 1892, 27 Stat. 277, 281.
[33] Rev. Stats. Secs. 1202 et seq (1895).

name is hardly associated with the changes in military law which have come about since World War II. In 1919, a bill was prepared by General Ansell which was introduced in the Senate and in the House of Representatives.[34] This bill was designed to revolutionize the Army court-martial system. Briefly, the proposed legislation provided that: every charge would be supported by the oath of a person subject to military law upon personal knowledge or upon personal investigation; no charge should be referred to, or tried by, a general court-martial unless an officer of the Judge Advocate General's Department indorsed, as his opinion, that a charge was legally sufficient and that there was prima facie proof of guilt; that charges be served and trial be had within specified periods or the accused released without opportunity for retrial; that penalties be imposed for failures to comply with provisions imposing procedural duties upon officers; enlisted personnel could serve on general or special courts; that the accused have the right of peremptory and for cause challenges against members; the right to file an affidavit of bias or prejudice against the convening authority; a trial judge, called the court judge advocate, be appointed for each general or special court with power to approve a finding of guilty or reduce to a lesser included offense and to suspend, in whole or in part, any sentence not extending to death or dismissal; the accused have military or civilian counsel; neither the appointing authority nor any other military authority

[34] S. 64 and H. R. 367, 66th Cong., 1st Sess. (1919).

review or control the finding of a court, excepting a sentence of death which was to be confirmed and ordered executed by the President, with power in the appointing authority to mitigate, remit, or suspend certain sentences; a court of military appeals be created, consisting of three judges appointed by the President, to review the record of proceedings of every general court or military commission which carried a sentence involving death, dismissal, or dishonorable discharge or confinement of more than six months, for the correction of errors of law. Other changes were provided. The obvious intent of the bill was to create a tribunal which would be a court, the proceedings of which from beginning to end would be wholly judicial[35] as distinguished from quasi-judicial or executive, functions.[36] The prevailing military view had been aptly summarized by Winthrop when he wrote:

> "Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.[37]

BOARDS OF REVIEW--U. S. ARMY--1918-1920.

At about the time of the Ansell revolt, an incident of riot and mutiny focused public attention upon the review procedures then in being. A report of this event recites:

[35] Runkle v. United States, 122 U. S. 543, 558.
[36] Morgan, The Existing Court-Martial System and the Ansell Army Articles, 29 Yale L. J. 52 (1919). The author of this article is the same Edmund M. Morgan who served as Chairman of the Forrestal Committee in 1948, for drafting UCMJ.
[37] Winthrop, op. cit., fn. 30, 49.

> "Early in that war [World War I] some troops stationed near Houston, Texas, engaged in a riot and a mutiny. Some of the offenders were promptly brought to trial by the court-martial for mutiny. The trial lasted several days and was carefully, fairly, and scrupulously conducted. Each night the stenographic transcription of the day's proceedings was brought to the Department judge advocate, who wrote his review as the trial progressed. On the last day several of the mutineers were found guilty and some were sentenced to death. That night the review was completed. The sentences were approved and confirmed by the Department commander pursuant to his authority under Article 48 of the 1916 code to confirm death sentences in time of war, and the next morning the sentences were carried into execution."[38]

Very promptly thereafter, Office Memo, JAG 321.4, of 6 August 1918, was promulgated thereby creating, within the Office of The Judge Advocate General of the Army, a Board of Review.[39] The War Department then established a pattern of appellate review by the promulgation of General Order No. 7, 1918, requiring the review of court-martial records in the Office of The Judge Advocate General or in a branch office before execution of any serious sentence.[40] The salient provisions of this order received statutory recognition and authority under the Act of 4 June 1920, by the enactment of Article of War 50½.[41] In part this Act provides:

> "Art. 50½. Review; Rehearing--The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.
>
> "Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of Article 46, Article 48, or Article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion, in writing, to The Judge Advocate General, who

[38] Legal and Legislative Basis, MCM, 1951, p. 147.
[39] Forward 1 BR by Myron C. Cramer, Major General, The Judge Advocate General of the Army.
[40] Mott, Hartnett and Morton, A Survey of the Literature of Military Law--A Selective Bibliography, 6 Vanderbilt L. Rev. 333, note 49, p. 347.
[41] 41 Stat. 797.

shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations directly to the Secretary of War for the action of the President.

"Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of The Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; .... In the event that The Judge Advocate General shall not concur in the holding of the board of review, The Judge Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilt, and may disapprove or vacate the sentence in whole or in part."

Branch Offices.

This act gave The Judge Advocate General the power to establish two or more boards of review within his office and to establish branch offices with any distant command. This power was exercised by the Army shortly after the outbreak of World War II. A Branch Office of The Judge Advocate General with the United States Army Forces in the British Isles was established on 22 May 1942, and on 9 November 1942 this office became the Branch Office of The Judge Advocate General with the European Theatre of Operations. On 27 October 1942, a branch was established for the China-Burma-India Theatre of Operations which on 24 October 1944 became the Branch Office of The Judge Advocate General with the United States Forces in the India-Burma Theatre. On 25 September 1944, a branch

was established for the Pacific Ocean Areas. The Branch Office of The Judge Advocate General with the United States Army Forces in the Mediterranean Theatre of Operations was so named on 1 November 1944, having been initially established on 8 March 1943. The Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific was first established for the South West Pacific Area on 11 July 1942, also serving the South Pacific Area until September 1944; the office was redesignated on 30 June 1945.[42] The Army discontinued the use of branch offices after the end of World War II. Statutory authority for branch offices has been carried over into the Uniform Code of Military Justice.[43] In December of 1955, The Judge Advocate General of the Navy established a branch office at San Francisco, California, with two boards of review which are currently functioning there. Neither the Air Force nor Coast Guard have branch offices at the present time.

It will be noted that the board of review constituted under Article 50½, supra, was strictly an advisory body with the duty to examine records and submit opinions. Examinations as to the legality of sentences and for legal sufficiency were limited to certain types of cases. The Judge Advocate General might approve or disapprove the holding of the board of review in forwarding a case to the Secretary of War for the action of the President.

[42] Mott, op. cit., fn. 40, 348.
[43] Art. 66, UCMJ.

The concept that courts-martial were executive instrumentalities to aid the President[44] was clearly recognized by the Congressional enactment of Article 50½.

First Board--Navy--1945.

In order to preserve some continuity in the chronology of events, attention again focuses upon the Navy. By simple precept, The Judge Advocate General of the Navy first appointed a board of review in his office on 10 March 1945, "for the purpose of reviewing and examining such records of trial by courts-martial as may be referred to it by The Judge Advocate General or The Assistant Judge Advocate General."[45] Others followed. The opinions of these boards were advisory only. There were no written rules of procedure; no briefs were filed; nor were oral arguments presented. In addition to courts-martial review, these boards were called upon to consider war crimes trial records, prepared changes to the Articles for the Government of the Navy, and other legal problems of importance. Boards of review, created in the same manner as had been the Army boards in 1918, continued to function in the Navy until the effective date of the Uniform Code of Military Justice, 31 May 1951.

THE JUDICIAL COUNCIL--THE ELSTON ACT.

The next matter of moment was the enactment of the Elston Act as an amendment to the Selective Service Act of 1948, supra.[46]

[44] Winthrop, op. cit., fn. 37.
[45] Navy Department, Office of The Judge Advocate General Letter JAG:I:HAS:la of March 10, 1945 (T.L. Gatch, Judge Advocate General).
[46] 62 Stat. 627.

Article of War 50½ was rescinded and replaced by Article 50 of the amendment.[47] This Article, in part, provides:

"Art. 50--Appellate Review--

"a. Board of review; judicial council.--

"The Judge Advocate General shall constitute, in his office, a Board of Review composed of not less than three officers of the Judge Advocate General's Department. He shall also constitute, in his office, a Judicial Council composed of three general officers of the Judge Advocate General's Department ... ."

"g. Weighing evidence.--In the appellate review of records of trial by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact." (Emphasis added.)

Under Secretary of War, Kenneth C. Royall,[48] in discussing the amendments which were being presented to Congress, made the following comment:

"The appellate process created by Article of War 50½ received a severe test during World War II, but so satisfactory have been the results that the War Department believes that the fundamental mechanism prescribed by Article of War 50½ should not only be perpetuated but should also be strengthened. Consequently, the Article has been rewritten and additional safeguards have been introduced.

"Of first importance is the grant of authority to The Judge Advocate General and the appellate agencies to weigh evidence and reconcile conflicts therein and to determine the credibility of the witnesses. Heretofore the power to weigh evidence has been confined to cases requiring confirmation by the President, but by this proposed amendment it will be extended to all classes of cases. Under this new grant of power, The Judge Advocate General and Boards of Review will possess the same power with respect to findings of facts as have generally been exercised by civil appellate courts in equity cases.

[47] 62 Stat. 635, Articles of War as amended June 24, 1948, 80th Cong., 2d Sess., Public Law 759.
[48] Royall, op. cit., fn. 2, 281.

> "Of equal importance is the introduction into the appellate procedure of a new reviewing tribunal to be known and designated as the Judicial Council. It will consist of three members who will be of general officer grade if they are available. ... The Judicial Council will not supplant the Boards of Review, but will form an additional appellate review tribunal for the most serious (but not capital) cases, principally those now requiring confirmation of the President acting through the Under Secretary of War."

It may well be said that the above changes were not by any means the only changes wrought by the 1948 amendments. That work established a code which was to become an integral part of the Uniform Code. The influences of General Ansell were strongly asserted. On one hand, strong forces have been exerting an ever-increasing pressure to reduce and diminish the attributes of military command in so far as they manifest themselves in the exercise of military discipline. On the other hand, those dedicated to the military concept have fought valiantly to preserve a heritage of more than three hundred years. The ancient customs and usages of the sea have blended with chivalrous deeds of heraldry to make the profession of arms on land or at sea a noble and an honorable profession. The military concept was not conceived as the arbitrary whim of the martinet motivated by revenge and brimming with resentment over the slightest encroachment upon his prerogatives of command but stems from a system older than the Constitution itself. Prior to the Constitution, the executive power of government vested in the Congress which on occasion exercised the power of finally acting upon the proceedings of general courts-martial.[49] From the adoption of the Constitution of the United States to the inception of the Uniform Code of Military Justice, all procedures in review

[49] Winthrop, Military Law and Precedents, p. 447, note 4 (1895 ed., 1920 reprint).

of court-martial records were conducted within the executive branch of the government with the ultimate power of remedial action reposing in the President himself.

THE UNITED STATES AIR FORCE.

The United States Air Force became a separate armed force effective 18 September 1947, as previously noted, upon passage of the National Security Act of 1947.[50] In order to establish a system of military law within the Air Force, Congress provided that "the Articles of War and all other laws now in effect relating to the Judge Advocate General's Department, The Judge Advocate General of the Army and the administration of military justice within the United States Army" would be applicable to the Air Force from June 25, 1948.[51] The day before, June 24, 1948, the Elston Act had been approved, to be effective February 1, 1949. Part of the Elston Act amended the Articles of War but a separate part of the same Act, which later became Sections 246, 247, and 249 of the Selective Service Act of 1948, established within the Army a Judge Advocate General's Corps. The Air Force took the position that only the new Articles of War were intended to apply to them. The general position was substantiated by court decision in the case of Stock v. Department of the Air Force,[52] but the court did not distinguish which part, either, or both of the acts applied. The Air Force did not desire a Corps. Congress removed

[50] 61 Stat. 495, Act of July 26, 1947.
[51] 62 Stat. 1014 (1948).
[52] 186 F.2d 968 (1950).

doubt in this area by enactment of the Air Force Organization Act of 1951. The provisions of the Elston Act did form the foundation upon which the Air Force system has been developed.

THE UNITED STATES COAST GUARD.

Before the effective date of the Uniform Code of Military Justice, the Coast Guard had its own disciplinary laws for maintaining discipline of Coast Guard personnel when not serving with the Navy.[53] The Coast Guard has become subject to the Uniform Code of Military Justice whether serving with the Navy or not.

[53] Articles for the Discipline of the United States Coast Guard, 63 Stat. 495, Act of August 4, 1949.

CHAPTER III.

THE CONVENING AUTHORITY

SCOPE OF REVIEW.

In approaching the problem of delineating the scope of review by a convening authority, it may not be amiss to consider briefly the identity of a convening authority and what it is that he is going to review. At the outset, it may be kept in mind that three types of courts-martial have been provided by the Uniform Code of Military Justice, to wit: General courts-martial, which shall consist of a law officer and any number of members not less than five; Special courts-martial, which shall consist of any number of members not less than three; and Summary courts-martial, which shall consist of one officer.[54] For the present purpose, a general court-martial has jurisdiction to try persons subject to the Code for any offense made punishable by the Code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by the Code, including the penalty of death when specifically authorized by the Code.[55] The special court-martial has jurisdiction to try persons subject to the Code for any noncapital offense and for capital offenses under Presidential regulation. A special court-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by the Code except death, dishonorable discharge, dismissal, confinement in

[54] UCMJ, Art. 16.
[55] Ibid., Art. 18.

excess of six months, hard labor without confinement in excess of three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months.[56] The summary court-martial may try persons subject to the Code except officers, warrant officers, cadets, aviation cadets, and midshipmen for any noncapital offense made punishable by the Code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by the Code except death, dismissal, dishonorable or bad conduct discharge, confinement in excess of one month, hard labor without confinement in excess of forty-five days, restriction to certain specified limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month's pay. Personnel of the Navy, Marine Corps, and Coast Guard may object to trial by summary court-martial in which event such person shall be tried by special or general court-martial. Army and Air Force personnel may likewise object to trial by summary court-martial, but only when such person has not demanded trial by court-martial in lieu of nonjudicial punishment.[57] The Navy had made use of the bad conduct discharge for many years, but its use within the Army and the Air Force began with the advent of the Uniform Code.

For the purposes of this discussion, the Convening Authority is the officer who convened the court-martial, whatever type, a

[56] Ibid., Art. 19.
[57] Ibid., Art. 20; (pars. 132 and 133, MCM, 1951).

successor in command, or any officer exercising general court-martial jurisdiction.[58] The Uniform Code contains express provision as to convening the particular types of courts-martial.[59] After every trial by court-martial, including rehearings and new trials, the record must be forwarded to the convening authority for initial review and action.[60] This record varies with the type of court involved and with the sentence adjudged. Each general court-martial is required to keep a separate verbatim transcript of all proceedings had before it.[61] A bad conduct discharge cannot be adjudged by a special court-martial unless a complete record of the proceedings and testimony before the court has been made.[62] When a bad conduct discharge is not adjudged, a record of trial by special court-martial need contain only a summarized report of the testimony, objections, and other proceedings.[63] In order to prevent the use of a special court-martial as a vehicle for the issuance of a bad conduct discharge, the Army has prohibited the appointment of reporters for special courts-martial without the prior approval of the Secretary of the Army.[64] The result of this action has been the elimination of trials before Army special courts-martial of offenses for which a punitive discharge would be appropriate upon conviction. Within the Army,

[58] Ibid., Art. 60; (par. 84, MCM, 1951).
[59] Ibid., Arts. 22, 23, and 24.
[60] Ibid., Art. 60; (par. 84, MCM, 1951).
[61] (par. 82, MCM, 1951).
[62] UCMJ, Art. 19.
[63] (pars. 15b and 83b(2), MCM, 1951).
[64] SR 22-145-1, as changed by C1, 6 Mar 1952.

the summarized report is most extensively utilized in cases which are tried by special courts-martial. The other services tend to utilize the verbatim transcript whether the sentence contains a bad conduct discharge or not. Unless otherwise prescribed by the convening or higher authority, the evidence considered by the summary court-martial is not required to be summarized or attached to the record of trial.[65] The Secretary of the Navy, as such higher authority, has provided for the use of a summarization of the evidence which relates to any specification of which an accused has been found guilty after a plea of not guilty before a summary court-martial.[66]

It was previously noted that the record of every trial by court-martial is forwarded to the convening authority for initial review and action. Having considered who are convening authorities, the types of courts-martial which they are empowered to convene, and the kind of records which are prepared by those courts, under varying conditions, the next inquiry will be directed toward the scope of review by the convening authority and the powers vested in him in connection with this review.

Provision for the initial review of court-martial records and the action to be taken thereon are generally contained in Chapter XVII of the Manual for Courts-Martial, United States, 1951, which contains paragraphs 84 through 91. Of these provisions,

[65] (par. 79e, MCM, 1951).
[66] 1955 NS, MCM, 1951, 0116.

paragraph 86b(1) contains the requirement that the convening authority before approving a finding of guilty or the sentence adjudged therefor, must determine: (a) that the court was legally constituted throughout the trial and had jurisdiction over the offense and the person tried; (b) that the accused had the requisite mental capacity at the time of trial and the requisite mental responsibility at the time of the commission of the offense; (c) that the competent evidence of record establishes each element of the offense of which the accused was found guilty; (d) that the sentence was within the power of the court to adjudge and within the prescribed limitations on punishments; and (e) that there were no errors which materially prejudiced the substantial rights of the accused.

The above is in implementation of Article 64 of the Uniform Code of Military Justice, which provides:

> "In acting on the findings and sentence of a court-martial, the convening authority shall approve only such findings of guilty and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he, in his discretion, determines should be approved. ..." (Emphasis added.)

In discussing this provision of the Code, the Court of Military Appeals looked to the legislative history of the Code in a recent case, United States v. Massey,[67] for the meaning of "in his discretion." The Court determined that Congress intended to grant the convening authority an exceedingly broad power to

[67] United States v. Massey (No. 5581), 5 USCMA 514, 18 CMR 138.

disapprove a finding or a sentence. Judge Brosman, writing for a unanimous Court, then went on to say:[68]

> "Originally these words were absent from the Code's draft. However, from the first the official commentary on the proposed Article 64 of the Code stated that the convening authority 'may disapprove a finding or a sentence for any reason.' (Emphasis supplied.) Hearings before the House Committee on Armed Services, 81st Congress, 1st Session, on H. R. 2498, pages 1182-1183. Mr. Larkin, one of the Code's principal draftsmen, explained that Article 64 'was intended to give him /the convening authority/ a free hand in doing anything he wants for any reason in cutting down the sentence or in disapproving.' However, certain members of Congress feared that the phrasing of the Article--as it then stood--was insufficient to make it fully comprehensible. Certain of the colloquy concerning the draftsmen's intention is highly pertinent to the present case:
>
> "'Mr. Brooks. He /the convening authority/ doesn't have to read the record or anything else/sic/. He can just say disapproved and it is through.
>
> "'Mr. Larkin. That is right. In the normal course of the review of the case he looks to its legality and the establishment of the facts and the appropriateness of the sentence and he shouldn't approve anything that is wrong or illegal, but he can disapprove it if it is illegal, if it is wrong, and for any other reason.
>
> "'Mr. Brooks. Or for no reason at all?
>
> "'Mr. Larkin. Or for no reason at all.
>
> "'Mr. Rivers. That is right.
>
> "'Mr. Larkin. The classic case that I think General Eisenhower stated in his testimony before your sub-committee last year was that even though you might have a case where a man is convicted and it is a legal conviction and it is sustainable, that man may have such a unique value and may be of such importance in a certain circumstance in a war area that the commanding officer may say 'Well, he did it all right and they proved it all right, but I need him and I want him and I am just going to bust this case because I want to send him on this special mission.' /House Hearings, supra, page 1184./

[68] Ibid., 520.

"'With the preceding discussion in mind the words 'in his discretion' were inserted. House Hearings, supra, page 1266. No sort of similar phrase appears in Articles 66 or 67, which provide for review by a board of review and by this court.'"

In a rather recent case, United States v. Wise,[69] the court determined the enumeration contained in paragraph 86b of the Manual, supra, was not intended to be all-inclusive and that any attempt to otherwise interpret it would be in conflict with Article 64 of the Code, set out above. Referring to Article 64, Judge Latimer, speaking for a unanimous Court, says: (p. 477)

"That language in essence states that he must determine whether or not the sentence as imposed is appropriate factually and it should be apparent that appropriateness includes something more than legality. Of course, an appropriate sentence must be legal, but the reverse is not necessarily true. The maximum legal punishment is seldom imposed except in aggravated cases. (Emphasis added.)

From the foregoing, it appears to be beyond controversy that the convening authority has the absolute power to disapprove any finding of a court-martial reviewed by him. Research has failed to disclose any qualification to this proposition. The same general principle applies to any sentence, except a mandatory death sentence, which he cannot even suspend.[70] Power to reduce a death sentence upon reduction of a finding will be discussed later.

LIMITATIONS ON SCOPE OF REVIEW.

No Power to Disapprove Finding of Not Guilty.

Consideration has thus far gone to the scope of review and the power of disapproval which, of course, is the converse of

[69] United States v. Wise (No. 6937), 6 USCMA 472, 20 CMR 188.
[70] (par. 88e, MCM, 1951).

approval. Attention will, therefore, be directed into the channel of "approval" and what, if any, limitations have been placed upon the power of "approval" as granted by Article 64 of the Uniform Code of Military Justice, supra.

Probably the most extreme situation which can be envisioned would be presented by the record of a court-martial trial which had terminated with a finding of not guilty. Does the convening authority have any power which would enable him to disagree with the court-martial or to compel such a court-martial to change, alter, or reconsider its findings?

Historical.

Turning back to the days of World War I, a case in point is presented. In the Tapalina case,[71] the accused, a military policeman, was found not guilty of a burglary charge by a general court-martial. The convening authority returned the case to the court with an endorsement amounting to an argument that the accused was guilty and that the finding of the court was wrong. On revision by the court-martial, the accused was thereupon found guilty. The Judge Advocate General of the Army expressed the advisory opinion that the accused was innocent. The convening authority, however, approved the conviction, and the sentence was ordered executed.

Manual and Code Provisions.

Under the Uniform Code of Military Justice, the convening authority may not return the record of any case for reconsideration

[71] Morgan, Background of the Code (1953), 6 Vanderbilt L.Rev. 169, 171.

by the court-martial of any finding of not guilty of any specification or of a ruling which amounts to a finding of not guilty.[72] The Manual provides:[73]

> "... Neither a finding of not guilty nor a ruling of a court which amounts to a finding of not guilty requires any action by the convening authority thereon. The latter should neither approve nor disapprove the action of the court in such a case. Disapproval cannot in any event affect the finality of a legal acquittal or a ruling of the court that amounts to a legal acquittal ... /and/ ... No action can be taken by the convening authority that would amount to censure of the court or the members thereof. See Article 37 ...."

Article 37, Uniform Code of Military Justice, to which the Manual makes reference, was designed to insure compliance with the above provisions and to eliminate the possibilities of other Tapalina cases. It provides in part:

> "No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court ...."

See also (par. 85b, MCM, 1951).

The first and probably most important limitation upon the power of the convening authority is, therefore, more accurately designed as a removal of not guilty findings from his purview. Two possible exceptions to the proposition that the convening authority lacks the power to review findings of not guilty will be treated later herein, i.e., insanity and jurisdiction, which deserve separate consideration. In reality, these considerations

[72] UCMJ, Art. 62(b)(2).
[73] (par. 86b(2)).

go to a determination of whether or not there was a trial rather than to a review of the not guilty finding. When so considered, neither is in fact an exception to the general proposition but something quite apart from it. Mention as possible exceptions at this juncture is merely to forestall premature questions in the reader's mind.

Referral to Legal Officer or Staff Judge Advocate.

Requirements.

The next limitation upon the power of the convening authority may or may not be an actual limitation, depending upon the situation presented. Under the Code,[74]

> "The convening authority shall refer the record of every general court-martial to his staff judge advocate or legal officer, who shall submit his written opinion thereon to the convening authority ...."

In conjunction with this provision is Article 65,[75] which is as follows:

> "(a) When the convening authority has taken final action in a general court-martial case, he shall forward the entire record, including his action thereon and the opinion or opinions of the staff judge advocate or legal officer, to the appropriate Judge Advocate General.
>
> "(b) Where the sentence of a special court-martial as approved by the convening authority includes a bad conduct discharge, whether or not suspended, the record shall be forwarded to the officer exercising general court-martial jurisdiction over the command to be reviewed in the same manner as a record of trial by general court-martial or directly to the appropriate Judge Advocate General to be reviewed by a board of review. If the sentence as approved by an officer exercising general court-martial jurisdiction includes a bad conduct discharge, whether or not suspended,

[74] UCMJ, Art. 61.
[75] UCMJ, Art. 65.

the record shall be forwarded to the appropriate Judge Advocate General to be reviewed by a board of review.

"(c) All other special and summary court-martial records shall be reviewed by a judge advocate of the Army or Air Force, a law specialist of the Navy, or a law specialist or lawyer of the Coast Guard or Treasury Department and shall be transmitted and disposed of as the Secretary of the Department may prescribe by regulations."

A note of explanation may prove helpful in this connection. A "law specialist" is construed to refer to an officer of the Navy or Coast Guard designated for special duty (law),[76] whereas a "legal officer" refers to any officer in the Navy or Coast Guard designated to perform legal duties for a command.[77] By law he need not be a lawyer. Judge advocates are lawyers commissioned as officers in the Army and the Air Force.

Supplementing the above provisions of the Code, the Manual provides further:[78]

"a. General.--Before acting upon a record of trial by general court-martial, or a record of trial by special court-martial which involves a sentence of bad conduct discharge, a convening authority who exercises general court-martial jurisdiction will refer it to his staff judge advocate or legal officer for review and advice. See Articles 61 and 65b.

"No person who has acted as member, law officer, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act as a staff judge advocate or legal officer to any reviewing (convening) authority upon the same case. (Art. 6c)

"If a convening authority has no staff judge advocate or legal officer, or if the person serving in that capacity is ineligible to act as staff judge advocate or legal officer for any reason (e.g., Art. 6c), he may request the assignment

76 UCMJ, Art 2(13).
77 UCMJ, Art 2(14).
78 (par. 85, MCM, 1951).

of a staff judge advocate or legal officer to review the record, he may forward the record to the appropriate Judge Advocate General for review and advice before acting thereon, or he may forward the record for action to an officer exercising general court-martial jurisdiction as provided in 84c.

"b. Form and content of review.--The staff judge advocate or legal officer to whom a record of trial is referred for review and advice will submit a written review thereof to the convening authority. The review will include a summary of the evidence in the case, his opinion as to the adequacy and weight of the evidence and the effect of any error or irregularity respecting the proceedings, and a specific recommendation as to the action to be taken. Reasons for both the opinion and the recommendation will be stated. The convening authority may direct his staff judge advocate or legal officer to make a more comprehensive written review or supplementary oral or written reviews or reports.

"c. Disagreement between convening authority and staff judge advocate or legal officer.--Ordinarily, the convening authority should accept the opinion of his staff judge advocate or legal officer as to the effect of any error or irregularity respecting the proceedings, as to the adequacy of the evidence, and as to what sentence can legally be approved. However, it is within the particular province of the convening authority to weigh evidence, judge the credibility of witnesses, determine controverted questions of fact that may have been raised in the record, and to determine what legal sentence should be approved. In those unusual cases in which a convening authority is in disagreement with his staff judge advocate or legal officer as to the effect of any error or irregularity respecting the proceedings, as to the adequacy of the evidence, or as to what sentence can legally be approved, the convening authority may transmit the record of trial, with an expression of his own views and the opinion of his staff judge advocate or legal officer, to the Judge Advocate General of the armed force concerned for advice. In any case which is forwarded to the Judge Advocate General, if the convening authority takes an action different from that recommended by his staff judge advocate or legal officer, he should state the reasons for his action in a letter transmitting the record to the Judge Advocate General (91a)...." (Emphasis supplied.)

Have these requirements that the records of trial be referred to the staff judge advocate or legal officer for review and advice

had the effect of "tying a mill-stone about the neck" of the convening authority? If so, what restrictions or limitations have been placed upon him? The legal officer or staff judge advocate is first required to include in his review a summary of the evidence in the case with his opinion as to its adequacy and weight.[79] It has been shown, however, that it is within the particular province of the convening authority to weigh evidence, judge the credibility of witnesses, and to determine controverted questions of fact that may have been raised in the record.[80] It would appear, therefore, that the opinion of the legal officer or staff judge advocate in this area is advisory only. Using the same process of deduction, it will be noted that secondly the written review will contain the opinion of the legal officer or staff judge advocate as to the effect of any error or irregularity respecting the proceedings.[81] This area, which may be differentiated as pertaining to matters of law, was not designated specifically as within the particular province of the convening authority.[82] It would appear that the drafters of the Manual, by omission, attempted to distinguish between questions of fact and questions of law. The third requirement of the review is, by inference, that it contain the opinion of the legal officer or staff judge advocate as to what sentence can legally be approved.[83] Here the Manual

[79] (par. 85b, MCM, 1951).
[80] (par. 85c, MCM, 1951).
[81] (par. 85b, MCM, 1951).
[82] (par. 85c, MCM, 1951).
[83] id.

placed the determination of what legal sentence should be approved within the particular province of the convening authority.[84] From this wording, it would appear that the legality of the sentence would be within the province of the legal officer or staff judge advocate with the convening authority relegated to a decision as to what portion of that part of the sentence, determined to be legal, he might desire to approve. A fourth requirement is that the review contain a specific recommendation as to the action to be taken by the convening authority.[85]

The Manual quite clearly assumes that the convening authority will, for the most part, accept the advice and opinions of his legal officer or staff judge advocate. Further consideration must, however, be given to the Manual provision as to disposition of those unusual cases in which a convening authority is in disagreement with his legal officer or staff judge advocate as to any matters within any of the four areas set out above.[86] It appears that in such event he is obliged to forward the record, the opinion of his legal officer or staff judge advocate, and his own views to his Judge Advocate General "for advice."[87] The Judge Advocate General may approve the findings and sentence, but, should he determine that any part of the findings or sentence is unsupported in law or if he so directs, the record shall be reviewed by a board

[84] id.
[85] (par. 85b, MCM, 1951).
[86] (par. 85c, MCM, 1951).
[87] id.

of review.[88] It should be borne in mind that the Code does not require that the convening authority of a special court-martial or a summary court-martial submit a record of trial to a staff judge advocate or legal officer. He may act with, or without, the benefit of such legal advice. If the sentence of a special court-martial, as approved by the convening authority, includes a bad conduct discharge, whether or not suspended, the record is forwarded through an officer exercising general court-martial jurisdiction for review in the same manner as a general court-martial record. The officer exercising general court-martial jurisdiction refers other cases to his staff legal officer or judge advocate[89] whereupon his action as supervisory authority becomes final.

In view of the foregoing, it may be concluded that a strict and literal analysis of the Code and Manual provisions, taken separately, may lead to misleading deductions, though not wholly erroneous. Taken as a whole and keeping in mind that the convening authority may disapprove such findings of guilty as he desires and that findings of not guilty are beyond his purview, the Code and the Manual do place limitations and restrictions upon him as to the approval of findings of guilty and sentences based thereon. His opinions in support of such findings and sentences are subject to the concurrence of his legal officer or

[88] UCMJ, Art. 69.

[89] Cf. United States v. Coulter (No. 2786), 3 USCMA 657, 664, 14 CMR 75.

staff judge advocate. If he fails to obtain such concurrence, he must then obtain it from The Judge Advocate General or from a board of review before the sentence can be executed. Further showing of the restrictions upon the convening authority by virtue of the imposition of a legal officer or staff judge advocate upon him will be found in the decisions.

DISQUALIFICATION OF CONVENING AUTHORITY.

Staff Judge Advocate's Prior Service as Trial Counsel.

The case of United States v. Coulter[90] involved an accused who was tried and convicted by special court-martial. He was sentenced to a bad conduct discharge and confinement at hard labor for six months. An officer designated as the "Acting Assistant Staff Judge Advocate" submitted a detailed post trial report, concluding with a recommendation that the bad conduct discharge be suspended. The staff judge advocate who had served as trial counsel at the trial of the accused did not concur. He prepared a report in which he characterized the accused as a "worthless individual" and a "liability to the Air Force." The findings and sentence were approved by the convening authority.

Chief Judge Quinn expressed the views of the majority in holding that Article 6(c) of the Uniform Code, providing that no person who had acted as trial counsel shall act as a staff judge advocate to any reviewing authority in the same case, was mandatory and failure to comply therewith evoked the principle of general prejudice, whereby the case was remanded for rehearing.

[90] United States v. Coulter (No. 2786), 3 USCMA 657, 14 CMR 75.

Judge Latimer, by his dissent, denies the applicability of the doctrine of general prejudice, pointing out that the accused was, in his opinion, entitled to no more than a reconsideration of the sentence. It was his view that Article 6(c), supra, was not violated, as the convening authority was not required to submit the record to a staff judge advocate. He then posed the query as to what result the majority would reach in the event that a staff judge advocate, similarly disqualified to act, should recommend leniency.

The above case is but one of some thirty cases heard before the Court of Military Appeals in which the Chief Judge and Judge Latimer have expressed divergent views regarding the application of the doctrine of general prejudice. Stripped of the "window dressings," it appears that the majority are correct in refusing to permit the trial counsel any active participation in the review process. In this case, no issue was raised in review regarding the guilt or innocence of the accused. There seems to be little reason, therefore, to subject the accused to another trial. It is possible that the doctrine of general prejudice might be so modified that its effect may be effectively cured by referral back to the level of the proceeding at which it occurred. It would have sufficed in this particular case. It is suggested that the only answer to Judge Latimer's query is that in all probability such matters will be resolved in favor of the accused. Unless he suffers some possible detriment, the question is not apt to be heard before the Court.

Trial Counsel's Preparation of Post Trial Review.

Chief Judge Quinn delivered the majority opinion in United States v. Clisson.[91] The accused was tried by a general court-martial, convened by the Commander, Flying Training Air Force. The appointed trial counsel was Major D, who, after the conviction of the accused, prepared a "Post Trial Interview" which he signed as "Staff Judge Advocate." It appears that he was actually the Wing Staff Judge Advocate of the Air Force Base, where the trial took place. His report included interviews with the accused, his squadron commander, the confinement officer, and the prison chaplain. He incorporated his conclusions with a recommendation that the sentence be approved. The Assistant Staff Judge Advocate prepared a review in accordance with the requirements of the Code, which was concurred in by the Staff Judge Advocate. The majority of the Court found that the report emanated from the Staff Judge Advocate of the command at which the court sat and that the reviewing authority's Staff Judge Advocate's report was so tainted by the impropriety of Major D's report as to fall short of that degree of impartiality contemplated by Article 6 of the Uniform Code. The decision of the board of review was reversed, and the case was returned to the convening authority to be reviewed by a qualified staff judge advocate.

Judge Brosman, in a concurring opinion, expressed the belief that the Court should not permit the post trial interview to be

[91] United States v. Clisson (No. 4635), 5 USCMA 277, 17 CMR 277.

made by the very officer who prosecuted the accused, and who may suffer from a certain natural, understandable, and quite unconscious bias. The accused might be incapable of complete communication to his erstwhile prosecutor, the Judge thought.

Judge Latimer, dissenting, pointed out that the trial counsel did not act as a staff judge advocate or legal officer to any reviewing authority in violation of the terms of the Code but had made a report well within the letter and spirit of the Code which would better enable the staff judge advocate and the convening authority to perform the duties devolved upon them.

Curiosity prompts a query as to what result the Court might have reached had the report not been signed as "Staff Judge Advocate." It is obvious that Major D did not act in that capacity to the convening authority. There were certainly too many lawyers performing duties which were not essentially legal. The reader is requested to notice the expenditure of talent and effort involved in the automatic review shown by this example. The case shows the Court of a mind to zealously protect the interests of the accused but taking a more practical approach to remedial action than resulted in the Coulter case, supra.

Related Situations.

The Court unanimously held that participation by the law officer in the preparation of the review of the staff judge advocate was prejudicial error necessitating a rehearing.[92] Serving as

[92] United States v. Crunk (No. 3653), 4 USCMA 290, 15 CMR 290.

trial counsel in a closely related matter disqualified the Assistant Staff Judge Advocate from conducting the post trial review.[93] On the other hand, the Court determined that the pretrial advice and recommendation of the staff judge advocate to the convening authority did not preclude his later participation in the review of the record of trial;[94] and in another case it was held that giving legal advice to the investigating officers did not evoke a disqualification of the staff judge advocate.[95] Numerous board of review decisions deal with variations of the factual situations considered by the Court. One further example will suffice to round out the considerations presented in this area.

ERRONEOUS ADVICE BINDING UPON CONVENING AUTHORITY.

In the recent case of United States v. Massey,[96] the Court of Military Appeals ordered a reconsideration by a convening authority because of erroneous advice given to him by his staff judge advocate. In an even later case, erroneous advice was given to the convening authority by the staff judge advocate. The Court affirmed the order of a board of review remanding the case to a different convening authority for further review.[97]

DISQUALIFICATION OF CONVENING AUTHORITY.

Becoming Accuser.

Having considered examples wherein the disqualification of the convening authority arose through his statutory assistant, the

93 United States v. Hightower (No. 4879), 5 USCMA 385, 18 CMR 9.
94 United States v. Haimson (No. 4549), 5 USCMA 208, 17 CMR 208.
95 United States v. DeAngelio (No. 999), 3 USCMA 298, 12 CMR 54.
96 United States v. Massey (No. 5581), 5 USCMA 514, 18 CMR 138.
97 United States v. Papciak (No. 8176), 7 USCMA 412, 22 CMR 202.

legal officer or staff judge advocate, it may be well to next consider the position of the convening authority himself. Examples will again serve to point up limitations and restrictions arising from his position. The Uniform Code defines the term "accuser"[98] and also provides that courts-martial shall be convened by superior competent authority when officers otherwise designated as convening authorities are accusers.[99]

In the Gordon case,[100] the accused was initially charged with having burglarized the dwelling of General E and with having attempted to burglarize the dwelling of General L. Prior to referral for trial, the staff judge advocate recommended to General L that the attempted burglary charge should be dismissed for the reason that the pretrial statement of the accused, which confessed the attempt to burglarize General L's home, was not corroborated by other substantial evidence. This was done, and General L thereafter convened the general court-martial which tried and convicted the accused of an offense against the home of General E. Subsequently, General L reviewed the record as convening authority. The court-martial sentenced the accused to be dishonorably discharged from the service, to forfeit all pay and allowances, and to be confined at hard labor for a period of five years. The convening authority approved only so much of the sentence as provided for dishonorable discharge, confinement at hard labor for two years, with forfeiture of all pay and allowances.

98 UCMJ, Art. 1(11), also (par. 5a(4), MCM, 1951).
99 UCMJ, Art. 22(b) and Art. 23(b), also (par. 5a(3), MCM, 1951).
100 United States v. Gordon (No. 258), 1 USCMA 255, 2 CMR 161.

Judge Latimer, in rendering the opinion of the Court, points out that the concept of the accuser being unable to appoint the court is not of recent origin. The first prohibition passed by Congress in 1830 applied to the prosecution of officers and remained unchanged until 1913. The Judge Advocate General of the Army as early as 1871 had extended the Act of 1830 to include the trial of enlisted men. The opinion, after searching the older authorities, states:

> "...we do not believe the true test is the animus of the convening authority. This undoubtedly was the early rule, but as we view it, the test should be whether the appointing authority was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter."[101]

Judge Latimer then went on to state:

> "In a general court-martial the convening and reviewing authorities are the same and if the officer is disqualified from convening he should not be qualified to review. The reviewing authority is vested with great power over the proceedings of a court-martial. He is at liberty to approve or disapprove the finding of guilty or to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of the lesser included offense, and he has the power to approve or disapprove the whole or any part of a sentence. Such power should not be vested in a person who is interested in the litigation."[102]

In the above case, the Court found the substantial rights of the accused were materially prejudiced. The holding of the board of review, which approved the conviction and sentence, as approved by the convening authority, was reversed and remanded to The Judge

[101] Id., p. 261.
[102] Id., pp. 261-262.

Advocate General of the Air Force for action not inconsistent with the opinion of the Court. It will be noted in this case that the error was dual in nature. That portion of the error disqualifying the convening authority from convening the court goes directly to the finding of guilty whereas disqualification to review is in effect a compounding of the original error. Put another way, the first error may affect what is in the record with the second going only to an evaluation of the record. It was this basic problem which caused Judge Brosman to comment in a concurring opinion that he preferred to bottom his concurrence on the concept of general prejudice. The majority opinion did not distinguish between specific prejudice and general prejudice in this case. No impelling reason appears to require that the principles enunciated have application only to general courts-martial. Although Articles 22 and 23 of the Uniform Code, supra, deal respectively with general and special courts-martial, the origin, background, and development of the principles should, by reason and logic, apply with equal force even to the appointment and review of a summary court-martial. The Manual attempts to exempt the convening authority of a summary court-martial,[103] but reason dictates that the accuser should forward to a superior authority.

It is clear that if the convening authority is an "accuser" he is divested of authority to convene any court-martial and his acts in convening a court-martial constitute prejudicial error.

[103] (par. 5c, MCM, 1951).

Divesting himself of authority to convene a court-martial has been shown to also disqualify review of the record of trial of any court-martial convened by him. Prejudicial error having been committed at the outset, considerations regarding the review are of little consequence. From a practical standpoint, any issues regarding the review have been effectively mooted. The Court has decided many cases arising under a wide variety of factual situations.[104]

As a Witness.

Events may well arise after the court-martial has been convened wherein the reviewing authority may be disqualified. The McClenny case[105] is in point. In this case, the accused was charged with an unauthorized absence. Extracts from the accused's service record and from the Unit Diary were admitted in evidence. The convening authority had authenticated the Unit Diary and extracts, thereby making himself a witness with respect to them. The accused presented evidence to dispute the accuracy of the service record entries and those in the Unit Diary, to the extent that the prosecution's case obviously turned upon the reliability of the entries. The Court found that although the convening authority had not become an accuser so as to preclude his convening the court-martial, he was placed in the position of determining the weight to be given to his own testimony, as the

[104] Illustrative "accuser" cases are: United States v. Marsh (No. 1526), 3 USCMA 48, 11 CMR 48; United States v. Keith (No. 3293), 3 USCMA 579, 13 CMR 135; United States v. Noonan (No. 4191), 4 USCMA 299, 15 CMR 299.

[105] United States v. McClenny (No. 5492), 5 USCMA 507, 18 CMR 131.

initial reviewing authority. The Court affirmed the test of objective reasonableness, set out in United States v. Gordon, supra, as the standard by which to judge the disqualification of a convening authority and were of the opinion that the test may be equally applied to the reviewing authority who has appeared as a witness against the accused.

Chief Judge Quinn notes that no statute or regulation prohibits a review by a reviewing authority who has been a witness against the accused. In his opinion, p. 510, he states:

> "The omission by Congress and the President of a specific statement of condemnation does not mean that this court is powerless to condemn conduct which destroys the integrity of a trial. On the contrary, it is not only within our power, but it is our duty to guard against any infringement of the fundamentals of a fair trial."

The Court determined that an error which prejudices a substantial right of the accused on the post trial review does not require, as a matter of law, that the conviction be set aside but that the error may be effectively cured at the level of the proceeding at which it occurred.

The relationship between the convening authority and his legal adviser appear to make them identical twins in many respects. The relationship possibly bears more legal semblance to an agency than a partnership. The acts of the principal are his own and may be disqualifying; nevertheless, he may also be disqualified because of the acts of his legal officer or staff judge advocate. The similarity ceases at that point, however, as the convening

authority cannot delegate his duties or responsibilities and cannot, therefore, act through agents or partners.[106] Disagreements between them must be resolved by higher authority. There can be little question but that all of the persons enumerated in Article 6(c) of the Uniform Code, to wit, member, law officer, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer, will be considered under the principles which have been discussed above. It appears that the Court is tending to consider the cases in this area without resort to the doctrines of general and specific prejudice and are leaning more toward a view of seeking to cure error, if possible, at the level of the proceeding at which it occurred. If applied to the examples discussed above, little difficulty would be encountered in arriving at a completely satisfactory result.

MATTERS OUTSIDE THE RECORD.

Error to Consider for Purpose of Approval.

In general, it may be said that the matters which have been thus far considered have been those matters which were contained within the record of trial itself. It is now proposed to change the direction of inquiry somewhat and toward a determination as to whether or not the convening authority is bound by the confines of the trial record. A helpful landmark in this direction is the case of United States v. Duffy.[107] There a general court-martial convened in Korea, convicted the accused, Duffy, of the larceny

[106] (par. 5a(5), 5b(2), 5c, MCM, 1951).
[107] United States v. Duffy (No. 1404), 3 USCMA 20, 11 CMR 20.

of two truck tires. The findings and sentence were approved by the convening authority over the contrary advice and recommendations of the assistant staff judge advocate and his immediate superior, the Corps judge advocate. In his letter of explanation to The Judge Advocate General, United States Army, as required by paragraph 85c of the Manual, the convening authority stated that the accused had previously confessed to the commission of the crime but, because of a technical failure to fully comply with the requirements of Article 31 of the Code, the confession was not admissible in evidence.

The Court, in setting aside the conviction for insufficiency of the evidence, pointed out that a failure to warn the accused of his rights, as required by the Code, was no mere "technicality." The Court then said: (p. 23)

> "By his utilization of 'evidence' outside the record in affirming the conviction of the accused, the convening authority unwarrantedly deprived the accused of the review guaranteed him by the Code and Manual .... Without hesitation, we say that the right of an accused to a review confined to the record adduced at his trial is safely within the guarantee of military due process of law .... We cannot conceive of a concept more repugnant to elementary justice than one which would permit appellate reviewing authorities to cast beyond the limits of the record for 'evidence' with which to sustain a conviction. It would not be tolerated in the civilian community for a single moment, and so long as this court sits, it will not be tolerated in the military. While we are not without understanding and sympathy for the vigorous reaction of the convening authority as a man, it must not be forgotten that he acted on the record of this trial as an official of the United States. His conduct as such an official was not only unlawful; it was lawless. It struck at the very heart of the Uniform Code and the current dispensation of military justice, and it cannot be condoned." (Emphasis added.)

Error Not to Consider for Purpose of Disapproval.

A more recent decision of the Court of Military Appeals presents a different facet of the problem. That case is United States v. Massey,[108] in which the Court rendered a unanimous decision. The accused was tried and convicted by general court-martial. He was sentenced to be dismissed from the service. The convening authority and an Army board of review approved. At the trial, the defense relied heavily upon character testimony. Two psychiatric witnesses testified that they, together with other psychiatrists, had examined the accused and found no homosexual traits. The law officer excluded tendered evidence as to the results of "lie detector" examinations of the accused and of several key prosecution witnesses which showed a lack of guilty reactions as to the accused but a marked degree of attempted deception as to the alleged victims. The accused testified at length, unequivocally denying the accusations of misconduct. Following the trial, but before the staff judge advocate had completed his review of the record, the defense submitted the certificate of an armed forces neuropsychiatrist, who recited the results of an examination of the accused under sodium pentothal or "truth serum." The certificate expressed the opinion that the accused was not guilty of the offenses for which he had been convicted and that he had a completely normal psycho-sexual life with none of the traits of homosexuality. The staff judge advocate advised the convening authority that the

[108] United States v. Massey (No. 5581), 5 USCMA 514, 18 CMR 138.

product of the lie detector examination had been properly excluded at the trial. He discussed in general terms whether the convening authority should consider the "truth serum" interview, and apparently his statements were also applicable to the "lie detector" tests. He indicated that the convening authority was without power to consider evidence outside the record of trial. Judge Brosman then discussed Article 64 of the Code and its legislative history, quoted supra. His opinion continued:

> "The staff judge advocate seems to have believed that United States v. Duffy, 3 USCMA 20, 11 CMR 20, prevented consideration by the convening authority of matters outside the record of trial. See also United States v. Gordon, 2 USCMA 632, 10 CMR 130. The answer to this contention was furnished by an Army board of review in United States v. Pratts-Luciano /CM 370895/, 15 CMR 481:
>
> "'We distinguish this case from United States v. Duffy ... which was vigorously urged by the defense as requiring reversal. In the Duffy case it positively appeared that evidence outside the record was utilized to affirm the conviction, whereas in this case it positively appears that evidence outside the record was considered only as a possible basis for disapproval and the conviction was approved solely on the evidence of record. In the Duffy case the accused was deprived of the review guaranteed him by the Code and Manual. In this case he was accorded that review in full. He should not complain that his case was given more consideration than the Code and Manual guarantee.'
>
> "The board of review further noted appropriately:
>
> "'In acting on the findings and sentence of a court-martial, the convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved.' (UCMJ, Art. 64) /Italics supplied./ That is to say, we believe, that the authority of a convening authority to approve findings and sentence is conditioned by the evidence of record and the law of the case, whereas his authority to disapprove is conditioned

only by his discretion. Where, as in this case, there is brought to the attention of a staff judge advocate a matter extraneous to the record that indicates disapproval may be warranted in the interests of justice, it is the staff judge advocate's duty to cause the matter to be investigated and reported to the convening authority with appropriate advice. The fact that his advice with respect to the extraneous matter may be adverse to the accused does not impeach his recommendation and the pursuant action of the convening authority on the record of the trial proper. To hold otherwise would be to circumscribe the convening authority in the exercise of his discretion under Article 64 of the Code and would induce, rather than prevent miscarriages of justice.'"

The Court made reference to another case decided by it, United States v. Walters,[109] which involved an interpretation as to whether certain items were parts of the record of trial. The Court found that they were, and as such were to be weighed by the convening authority and the board of review. By dicta, Judge Brosman then commented that he was not saying that if the Court had found the items to fall outside the record, they could not have been considered by the convening authority. The items were certificates regarding unauthorized conferences by court personnel, during the trial, not revealed in the record of trial.

The author Judge then continued into what appears to be a very fine line of distinction. For accuracy, his language will again be quoted.

"Government appellate counsel have argued that, when construed as a whole, the staff judge advocate's advice did, in fact, allow the convening authority to consider the results of the out-of-court investigations, but permissibly informed him that the weight to be accorded them was not such as to justify overturning the findings of guilt returned by the court. We do not at all deny that a staff judge advocate--

[109] United States v. Walters (No. 3734), 4 USCMA 617, 16 CMR 191.

> in the course of his review of a case--may express his own conclusions with respect to the weight of evidence submitted at the trial, together with the import of matters learned from sources outside the record. Nor may the accused justly complain if that evaluation of evidence or information is adverse to him. United States v. Pratts-Luciano, supra. Moreover, a staff judge advocate may allowably go further--indeed to the point of informing a convening authority that he believes it would constitute an abuse of discretion to grant substantial weight to evidence secured and presented extrajudicially. The line of legality is distinctly passed, however, when the staff judge advocate's review creates in the mind of the convening authority the impression that he would err in law if he were to go outside the formal record of trial for the purpose of determining his action on findings and sentence."

The case was remanded to an officer other than the one who convened the court-martial which tried the case. The Judge pointed out one further item of interest in that the convening authority did not have authority to change a dismissal to an administrative discharge. Therefore, in this case, the extrajudicial tests were relevant only to the guilt or innocence of the accused. Clemency was not in issue. From the above, it appears to be crystal clear that had the tests pointed toward the guilt of the accused rather than toward his innocence, the decision would have clearly fallen within the purview of the Duffy case, supra. Rather, the cases are but demonstrative of the muni[illegible] which accompanies an accused even at the initial review of his case. Angels may dance upon the head of a pin, but staff judge advocates, legal officers, and convening authorities had best seek firmer footing. The only logical deduction which can reasonably be drawn from the cases is that matter outside the record of trial may be considered by the convening authority as a basis for disapproval of a finding of guilty

or a sentence, but he may not consider such matter as a basis for the approval of a finding of guilt. From the background material, which has been developed thus far, the convening authority has far broader powers than have been given to boards of review or to the Court of Military Appeals. It may be stated categorically that the convening authority has all the power which is possessed by either a board of review or the court but is not subject to all of the limitations which are placed upon them. Subsequent inquiry will seek a delineation of their powers. It is for this reason that only cursory consideration will be given to three remaining spheres for inquiry, i.e., insanity, jurisdiction, and policies.

May Consider When Relating to Insanity.

The Manual[110] provides that when it appears from the record or from any other source that the accused may have been insane at the time of the commission of the offense or at the time of trial, regardless of whether such question was raised at the trial or how it was determined, the convening or higher authority should disapprove any findings of guilty affected by a reasonable doubt as to the sanity of the accused. Before action is taken on the record, the convening or higher authority may refer the matter to a board of one or more medical officers for their observation and report with respect to the sanity of the accused. Suffice it to say, at this point, that there are no restrictions upon the convening authority restricting such inquiry into the mentality of the accused as may be warranted in the interest of justice.

[110] (par. 124 and 86e, MCM, 1951).

May Consider When Relating to Jurisdiction.

Only a passing reference will be made to this very broad field of inquiry. The Manual[111] provides:

> "If the court lacks jurisdiction or if the charges fail to allege any offense under the Code the proceedings are a nullity. These objections cannot be waived and may be asserted at any time."

Error to Consider Policy Instruction as Mandatory.

A broader consideration will be given to this matter in considering policy matters in general. In the first place, it must be assumed that commanding officers, who are also convening authorities, know all policies promulgated within their own commands. They are also charged with knowledge of policy directives from higher authority. It may, therefore, be assumed that they do have knowledge of such policy directives as may be pertinent to each and every case initially reviewed. No difficulty is encountered in this area unless there is some indication that a policy directive may have been misunderstood. The case of United States v. Doherty[112] will serve to illustrate the difficulty encountered in this field. SECNAV INSTRUCTIONS 1620.1, dated June 5, 1953, was an instruction issued by the Secretary of the Navy and distributed to all ships and stations of the United States Navy. The instruction designated procedure for the disposition of cases of homosexuality involving naval personnel and expressed the policy that known homosexual individuals

[111] (par. 68b, MCM, 1951).
[112] United States v. Doherty (No. 4884), 5 USCMA 287, 17 CMR 287.

are military liabilities and must be eliminated from the service. The accused was convicted before a general court-martial and sentenced to a punitive discharge. The Court unanimously recommended that the bad conduct discharge be remitted. The District Legal Officer recommended that the sentence not be remitted or suspended because of the Navy Department policy. The convening authority took no action because of the SECNAV INSTRUCTION, so stating on the record but further recommended that the recommendation of the Court be further considered upon the clemency review within the Office of The Judge Advocate General of the Navy.

Judge Latimer, writing for the majority of the Court, said, referring to the instruction:

> "...if the language is construed as an inviolable command to those in the military judicial system, such as courts-martial, the convening authorities, or boards of review, then the instructions conflict with the Code and must yield. We do not interpret them to go that far, but we are convinced the convening authority did. If so, he failed to make that independent evaluation of the appropriateness of the sentence approved by him which Congress decreed he make."

The case was thereupon returned to the convening authority for reconsideration to remove any and all doubt as to whether he approved the bad conduct discharge solely because he misunderstood the scope and legal effect of the policy instructions.

Error Not to Consider for Adequacy.

In another illustrative case, United States v. Wise,[113] it appears that the convening authority had announced a policy advising his command that he would not consider the retention in the military service of any individual who had been sentenced to a punitive discharge.

[113] United States v. Wise (No. 6937), 6 USCMA 472, 20 CMR 188.

The Court, speaking through Judge Latimer, said:

> "It would appear that if it is a valuable right to have sentence passed upon by a convening authority who is free from any connection with the controversy, it is equally important to have one's sentence considered by a convening authority who does not arbitrarily refuse in advance to mitigate an important part of the sentence, no matter what factors might be brought to his attention ... if the accused was seeking to raise error because the convening authority had not seen fit to suspend the execution of the sentence, we would not have entertained his petition for review. But in actuality he requests something entirely different, as he asks that the convening authority be required to consider with an open mind those matters which accused seeks to offer for clemency purposes .... We have consistently held that a convening authority is unfettered in his liberty of deciding on the appropriateness of a sentence and unlimited as to the sources from which he gathers the information which serves as the foundation for his action ... he may rule on the sentence as he chooses, but he cannot, without abusing the power vested in him by the Code, refuse to listen."

These examples will serve further to substantiate the showing heretofore made concerning the over-all restrictions and limitations placed upon the convening authority. More of this type of restraint exhibits itself as command influence directed toward the courts or members of them. There have been many cases in this very closely related field,[114] but those cases deal primarily with pretrial procedure which is not directly within the present inquiry.

Before passing on into an examination of the scope of review before boards of review, a word or two may be in order regarding supervisory authorities. Obviously the largest number of cases involving offenses committed by military personnel are of a relatively minor nature. Just as within the civilian community, there are far

[114] E.g., United States v. Fowle (No. 8339), 7 USCMA 349, 22 CMR 139; United States v. Costner (No. 3102), 3 USCMA 466, 13 CMR 22; United States v. Littrice (No. 2809), 3 USCMA 487, 13 CMR 43; United States v. Isbell (No. 3319), 3 USCMA 782, 14 CMR 200; and United States v. Ferguson (No. 3289), 5 USCMA 68, 17 CMR 68.

more traffic violations than murders. Most of the records of trial by summary courts-martial and a sizeable proportion of special courts-martial deal with these offenses. Without considering minor exceptions, those cases wherein the sentences adjudged do not extend to a punitive discharge, whether or not suspended, are forwarded to the officer exercising general court-martial jurisdiction over the command, as supervisory authority. For all practical purposes, his review of these cases is final. All cases must be reviewed by qualified service lawyers whose reviews are similar to those of the legal officers and staff judge advocates of the convening authority. In general, it may be said that powers, duties, responsibilities, restrictions, and limitations of the convening authority are applicable to the supervisory authority. The functions of the supervisory authority are of the greatest importance in the administration of military justice. This phase of the appellate review system is not being by-passed as inconsequential but only because of its marked similarity to the all important functions of the convening authority.

CHAPTER IV.

THE COURT OF MILITARY APPEALS AND BOARDS OF REVIEW

GENERAL BACKGROUND.

In Chapter II, an effort was made to show the historical background and development of the board of review. It was shown that boards of review came into being in the Army by Department Order in 1918 as advisory boards. In 1920, they were given statutory recognition. The Navy first established an advisory board of review in 1945. Shortly thereafter, the Elston Act was enacted into law. This 1948 enactment empowered the Army boards of review to weigh evidence, judge the credibility of witnesses, and to determine controverted questions of fact. The Army continued to function under the legislation until the enactment of the Uniform Code of Military Justice which became effective on May 31, 1951. From the creation of the Air Force as a separate branch of service, the 1948 legislation served as their law until the effective date of the Code. During the period from 1945 to 1951, the Navy continued to utilize their boards of review, created internally within the Office of The Judge Advocate General of the Navy. Uniform Rules of Procedure for Proceedings in and before the boards of review were promulgated jointly by the Army, Navy, Air Force, and the Treasury Department on June 8, 1951.[115] The Elston Act, to a very broad degree, was an attempt to provide legislation which

[115] DA Bull. 9, NAV EXOS P-932 and AF Bull. 24.

was remedial as to most of the complaints lodged against military justice following World War II. It incorporated much of the thinking which found expression in the various committee reports of those committees which had made intensive studies of the problems involved. It is little wonder, therefore, that the Uniform Code of Military Justice should bear a striking resemblance to its immediate predecessor, the Elston Act. The Army and the Air Force found very little substantial change brought about by the advent of the Code. The Navy, Marine Corps, and Coast Guard faced a different situation. New concepts and nomenclature were presented. Their deck court became a summary court. Their summary court became a special court. Their advisory board of review became a statutory board functioning within a new system of appellate review. The judicial council of the Elston Act was abolished, and the Court of Military Appeals substituted in its place. The Court was new to all of the services. The law officer, as a functionary of the general court-martial, was new to the Navy. No further effort will be made toward pointing out deviations between the new and the old, excepting as it may bear upon the functions of the boards of review and the Court of Military Appeals.

During the period between 1948 and 1951, Army and Air Force boards of review and the judicial councils were presented with many novel problems. The recorded decisions of these bodies proved most helpful to the military lawyer in orienting his problems to the Code. Subsequent to adoption of the Code, the recorded

decisions of the boards of review of all of the services have provided a rich source for legal research. The boards of review have looked to the decisions of other boards for guidance. These cases have been of inestimable value to the Court of Military Appeals. The Court on frequent occasion has made reference to the board decisions and not infrequently has adopted the reasoning of a board decision in formulating its own opinions. The boards of review of one service are not bound by the board decisions of any other service nor for that matter by the decisions of other boards within the same service. The Court of Military Appeals, on the other hand, is the Supreme Court of military justice and their decisions do establish precedents which are binding upon the service. The Court has now been in being for more than five years and has considered several thousands of cases. Seven volumes of their decisions have been published, which provide a broad and comprehensive source of legal precedent. Because the opinions of the Court are authoritative and binding uniformly throughout the services, the discussion which follows will not make reference to board decisions but will only consider decisions of the Court of Military Appeals. The foregoing comment is not intended in any way to belittle or minimize the outstanding work which has been accomplished by the boards of review and the very substantial contributions which they have made to legal thinking in the field of military law. Practical expedience also dictates some delineation as to the breadth of exploration.

SCOPE OF REVIEW.

Boards of Review--Authority Under the Code.

The Uniform Code of Military Justice is the legislative foundation upon which the system of military justice is founded. As was noted in the previous chapter, the Manual for Courts-Martial, United States, 1951, implements the Code and is supplementary thereto. In passing now to a consideration of the boards of review and the Court of Military Appeals, their respective scopes of review, and such limitations as may have been placed thereon, attention will again be directed to the provisions of the Code and the Manual. It is believed that the boards and the Court can best be considered together, comparing and distinguishing their functions where possible.

Of primary concern and the only article dealing exclusively with boards of review is Article 66[116] which provides as follows:

> "(a) The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.
>
> "(b) The Judge Advocate General shall refer to a board of review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.
>
> "(c) In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the

[116] UCMJ, Art. 66.

sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

"(d) If the board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the finding and sentence and does not order a rehearing, it shall order that the charges be dismissed.

"(e) The Judge Advocate General shall, unless there is to be further action by the President or the Secretary of the Department or the Court of Military Appeals, instruct the convening authority to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

"(f) The Judge Advocates General of the armed forces shall prescribe uniform rules of procedure for proceedings in and before boards of review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of The Judge Advocates General and by the boards of review."

Another provision of the Code which is pertinent is that part of Article 71[117] which provides:

"No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more shall be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals." (Emphasis added.)

The Manual[118] provides that a court shall not adjudge a sentence of confinement at hard labor for a period greater than six months unless the sentence includes a dishonorable or bad conduct discharge. The result of this provision is that almost all cases

[117] UCMJ, Art. 71(c).
[118] (par. 127b, MCM, 1951).

involving a sentence to confinement in excess of six months will be reviewed by a board of review rather than those involving a sentence to confinement in excess of one year in accordance with Article 71(c), supra.

Another source of reviewable cases will be found in Article 69[119] wherein the following appears:

> "Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by Article 66, shall be examined in the Office of The Judge Advocate General. If any part of the finding or sentence is found unsupported in law, or if The Judge Advocate General so directs, the record shall be reviewed by a board of review in accordance with Article 66, but in such event there will be no further review by the Court of Military Appeals except pursuant to the provisions of Article 67(b)(2)." /This reference provides that The Judge Advocate General may order cases reviewed, by a board of review, forwarded to the Court of Military Appeals for review./

By the express provisions of Article 70[120] The Judge Advocates General are required to appoint qualified legal counsel to serve as appellate government counsel and as appellate defense counsel. These counsel represent the Government and the accused respectively before the boards of review and the Court of Military Appeals. In addition, the accused has a right to be represented before the boards of review and the Court by civilian counsel if provided by him. The accused may be represented by military counsel at every stage of the proceedings against him up to and including the appellate court without expense to him. If he chooses to be represented by

[119] UCMJ, Art. 69.
[120] UCMJ, Art. 70.

civilian counsel, he must do so at his own expense. Under the provisions of Article 68[121] boards of review may be established in branch offices of a Judge Advocate General whenever the President deems such action necessary. It was mentioned in Chapter II, hereof, that the Navy has such a branch office in San Francisco. The other services do not have such branches at the present writing.

The system, which the above Code provisions established, provides an intermediate appellate body which is quite comparable to the Court of Appeals in the Federal judiciary system.[122] The boards of review do have broader powers, however. Most appellate courts act only upon questions of law, whereas boards of review weigh the evidence, judge the credibility of witnesses, determine controverted questions of fact, and may reduce any sentence deemed inappropriate.[123]

The United States Court of Military Appeals--Authority Under The Code.

As was also noted, above, the United States Court of Military Appeals came into being upon the adoption of the Uniform Code of Military Justice. It was new to the military services and without precedent. The judicial councils within the Army and the Air Force which had functioned from 1948 to 1951 were abolished and the Court was established in their stead. It is interesting to note that this Court very closely approximates that recommended by General Ansell

[121] UCMJ, Art. 68.
[122] Latimer, A Comparative Analysis of Federal and Military Criminal Procedure, 29 Temp. L. Q. 23 (1955).
[123] Ibid., p. 24.

at the close of World War I. The historical development shown in Chapter II pointed in the direction that the court-martial system has always been a part of the Executive Branch of the Government as distinguished from the judicial branch.[124] This position was somewhat challenged by a later case[125] holding.

The precise status of the court-martial system and the applicability of certain provisions of the Constitution of the United States thereto is currently the subject of a considerable amount of legal research. This problem is much too broad to be undertaken in the present inquiry. For present purposes the viewpoint will be adopted that the court-martial system within the Armed Forces of the United States is constitutionally a part of the Executive Branch of the Government, including the appellate tribunals which are an integral part of the system. For all practical purposes, however, the functions performed throughout the system are of a judicial nature.[126] The Constitution[127] provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office. By establishing a tenure of office for the judges of the Court of Military Appeals

[124] Dynes v. Hoover, 20 How. 65 (1858).
[125] Runkle v. United States, 122 U.S. 543.
[126] United States v. Whitman (No. 2168), 3 USCMA 179, 11 CMR 179; United States v. Lanford (No. 6540), 6 USCMA 371, 20 CMR 87.
[127] (U. S. Const., Art. III, sec. 1).

of something less than good behavior, the Congress distinguished these judges from those of the inferior courts. Members of the boards of review may be officers or civilians appointed by the respective Judge Advocates General.[128]

It has been said that for all practical purposes the Code sets up three judicial or quasi-judicial bodies: The court-martial (trial court), the board of review (appellate forum), and the Court of Military Appeals (appellate court).[129] These bodies are the creatures of statute, and their powers are limited to those which Congress has expressly granted or implied.[130]

Having already set forth the Code provisions specifically granting authority to the boards of review, it will now be well to look to the Code provisions upon which the Court is dependent for its power. Article 67[131] comes into focus with the following provisions:

> "(a)(1) There is hereby established a Court of Military Appeals, which shall be located for administrative purposes in the Department of Defense. The Court of Military Appeals shall consist of three judges appointed from civilian life by the President, by and with the advice and consent of the Senate, for a term of fifteen years .... The Court of Military Appeals shall have power to prescribe its own rules of procedure and to determine the number of judges required to constitute a quorum. A vacancy in the court shall not impair the right of the remaining judges to exercise all the powers of the court ....
>
> "(b) The Court of Military Appeals shall review the record in the following cases:

[128] UCMJ, Art. 66(a), supra.
[129] United States v. Reeves (No. 453), 1 USCMA 388, 3 CMR 122.
[130] United States v. Lanford (No. 6540), 6 USCMA 371, 20 CMR 87; United States v. Brasher (No. 499), 2 USCMA 50, 6 CMR 50; United States v. Whitman (No. 2168), 3 USCMA 179, 11 CMR 179; United States v. Papciak (No. 8176), 7 USCMA 412, 22 CMR 202.
[131] UCMJ, Art. 67.

"(1) All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;

"(2) All cases reviewed by a board of review which The Judge Advocate General orders forwarded to the Court of Military Appeals for review; and

"(3) All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review ....

"(d) In any case reviewed by it, the Court of Military Appeals shall act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review. In a case which The Judge Advocate General orders forwarded to the Court of Military Appeals, such action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, such action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law.

"(e) If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing it shall order that the charges be dismissed.

"(f) After it has acted on a case, the Court of Military Appeals may direct The Judge Advocate General to return the record to the board of review for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President, or the Secretary of the Department, The Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges. ..." (Emphasis added.)

Court Rules

The provisions of the Manual[132] in general add very little to the Code provisions as set forth above. Specific reference will be made to Manual provisions as may become necessary to the discussion.

[132] (Chap. XX, Pars. 98 to 108, MCM, 1951).

Before proceeding to an examination of the cases themselves, two other possible sources of guidance will be consulted. The first of these will be the Rules of Practice and Procedure before the United States Court of Military Appeals.[133] Pertinent extracts provide as follows:

"Rule 3. Jurisdiction.

"The court will review the record in the following cases:

"(a) General or flag officers; death sentences. All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer, or extends to death;

"(b) Certified by The Judge Advocate General. All cases reviewed by a board of review which The Judge Advocate General forwards by Certificate for Review to the Court; and

"(c) Petitions by the accused. All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court has granted a review, except those reviewed under Article 69.

"Rule 4. Scope of Review.

"The court will act only with respect to the findings and sentence as approved by the convening or reviewing authority, and as affirmed or as set aside as incorrect in law by a board of review. In those cases which The Judge Advocate General forwards to the Court by Certificate for Review, action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, action need be taken only with respect to issues specified by the court in the grant of review. The court may, in any case, however, review other matters of law which materially affect the rights of the parties. The points raised in the Court will involve only errors in law."

Board Rules.

The second source is found within the Uniform Rules of Procedure for Proceedings in and Before Boards of Review,[134] wherein Rule IXF contains the following:

[133] 1 USCMA xxiii.

[134] Op. cit., fn. 115, supra, also reproduced as Appendix IV, 1955 Naval Supplement to the Manual for Courts-Martial, United States, 1951.

"F. Matters outside record.--Matters outside the record of trial will not be presented to or argued before a board of review except with respect to:

"1. A petition for a new trial referred to a board under Article 73.

"2. A question of jurisdiction.

"3. Matters affecting the sanity of an accused tending to show that further inquiry as to his mental condition is warranted in the interest of justice.

"4. Matters as to which judicial notice may be taken in military law.

"When requested by The Judge Advocate General, a board of review may hear and report to him on any matter outside the record in mitigation of the sentence or otherwise in the interest of justice."

LIMITATIONS ON SCOPE OF REVIEW.

At this juncture, it will be noted that the boards have apparently been given dual functions under Article 66(c), supra. The first deals with a review of findings of guilty as approved by the convening authority. The second is concerned with the sentence as approved by the convening authority. In examining the cases, therefore, the possibility of severability of functions will be kept in mind. It is also possible that some distinction may exist in the functions of the Court, although the Court takes action only with respect to matters of law.

Limited to Record as to Findings.

The Whitman case[135] was considered in the previous chapter. It was the case in which the accused stood convicted by special

[135] United States v. Whitman (No. 2168), 3 USCMA 179, 11 CMR 179.

court-martial for the possession and sale of heroin. One R had been convicted of similar charges arising out of the same transaction by a different special court-martial. R's conviction was set aside by the convening authority on the ground of entrapment. A Navy board of review reversed the conviction of W, as approved by the convening authority and the supervisory authority, and dismissed the charges, concluding that it would "create an injustice" to the accused, W, to permit his conviction to stand in the face of the dismissal as to R. Judge Brosman, writing for a unanimous Court, and after quoting Article 66(c), fn. 116, supra, as follows:

> "It is quite apparent that boards of review, like other appellate bodies exercising judicial or quasi-judicial functions, are limited to the record presented to them. Although the matter dehors the record resorted to in this case operated in favor of the accused, this does not change the essentially erroneous character of the board's action, nor serve to supply authority where none exists. If the board's present action were to be approved, it would be illogical to deny to any reviewing authority the power to examine matter aliunde the record which would operate against the interest of the accused person. That is to say, such an authority might be permitted to look outside the record for evidence of guilt. This we have already branded as reversible error at the hands of a convening authority. United States v. Duffy (No. 1404), 3 USCMA 20, 11 CMR 20, decided July 3, 1953. Therefore, the historic limitation mentioned earlier must, of necessity, apply to boards of review."

Matters of Law or Fact.

Within that area delineated as review of the findings, it is quite clear that Article 66(c) of the Code, supra, granted to boards of review the authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. It is equally

clear that the Court was granted authority by Article 67(d) of the Code, supra, to take action with respect to matters of law. A determination as to the sufficiency or insufficiency of evidence to sustain a conviction is without question a matter of law. It will be readily perceived that there are all manner of gradations between matters of fact and matters of law, not clearly recognizable as either. This conflict was recently before the Court in the case of United States v. Hendon[136] wherein the accused entered a plea of not guilty to a charge of desertion. He was convicted by general court-martial. The convening authority approved but the board of review reduced the finding to the lesser included offense of absence without leave, although it affirmed the sentence. The board, in expressing its finding, stated:

> "We do not think the mere proof of the inception of an unauthorized absence and the termination of the absence by apprehension is sufficient to prove beyond a reasonable doubt the requisite intent to desert. In this case the court had before it only evidence of an unauthorized absence for about one hundred and twelve days. No evidence was before the court indicating the condition of the absence. Mere length of absence will not justify the court to draw an inference of intent."

This language was in the face of language of the Manual, also quoted by the board, to the effect that if the condition of the absence without proper authority is much prolonged and there is no satisfactory explanation of it, the court-martial will be justified in inferring from that alone an intent to remain absent permanently.

Judge Latimer, in writing for a unanimous Court, characterized the board's decision as follows:

[136] United States v. Hendon (No. 8679), 7 USCMA 429, 22 CMR 219.

"This verbiage, as we understand it, is no more than a holding that, as a matter of law, an intent to remain away permanently may not be inferred by a reasonable court member from an absence of one hundred and twelve days terminated by apprehension .... This, of course, amounts to saying that the court-martial erred in returning a finding of guilty of desertion on the evidence presented to it .... Phrased differently, the board was expressing the view that no reasonable man could believe that this accused intended to remain away permanently when the evidence showed that he had been absent without leave for over three months and then was apprehended rather than returning voluntarily .... Here the board was arguing that the court-martial had an insufficient base to support an inference of the requisite intent, which is a legal question. Its members did not assert that they personally were not convinced beyond a reasonable doubt that the accused intended to remain away permanently, a factual matter which would have been within their domain. ... "

In determining whether the board of review had exceeded its fact-finding authority, the opinion goes on to state:

"We have ever been loath to interfere with the exercise by a board of review of its fact finding powers. Heretofore, in doubtful cases we have demanded that boards clearly indicate whether they are making factual or legal determination. If the former, we may with propriety only insist that the finding be one which a reasonable man could reach. Applied to this case, we are unwilling to say that no reasonable man could believe that this accused did not intend to desert. In other words, we do not believe that all reasonable men would agree that Hendon intended to remain away permanently. Some reasonable men could so believe, most reasonable men would, but we cannot say that all would be impelled to do so ...."

In discussing the contention that the case presented only a factual determination which involved the exercise of a power reserved exclusively to the board of review and beyond the power of the Court, the opinion further states:

"In United States v. Moreno, 6 USCMA 388, 20 CMR 104, we recognized that boards of review have been given plenary fact-finding powers by Article 66(c) of the Code ... subject only to the limitations that they bear in mind that the trial forum saw and heard the witnesses and that their action must not be

> arbitrary, capricious, or one which no reasonable person would take. A necessary corollary to the Moreno holding may be found in United States v. Bunting, 6 USCMA 170, 19 CMR 296, where we held that if a board of review clearly exercised only its power to make factual determinations in a situation where reasonable men might differ as to whether the Government had carried its burden of proving guilt beyond a reasonable doubt, we had no authority to review its decision. Of course, a board of review may not defeat review in this court by labeling as questions of fact those matters which are questions of law or mixed holdings of law and fact. United States v. Benson, 3 USCMA 351, 12 CMR 107."

In this case, the Court has added requirements to the fact-finding powers granted to boards of review by Article 66(c), supra. The action of the board of review (1) must not be arbitrary, (2) capricious, or (3) one which no reasonable person would take.

The introduction of that fictitious character in the law, long known as the reasonable man, may cause difficulty. He has been used in a wide variety of situations as a standard. What would he do under like or similar circumstances? This has been a yardstick by which to measure other men. By pluralizing the reasonable man into reasonable men, as was done in the Hendon case, then saying that some reasonable men would do one thing, whereas others would not, any semblance of a standard has been destroyed. Mention is made of this point and, for that matter, the case itself, as merely illustrative of the type of difficulty which arises within the review of findings area. Subtle distinctions between matters of fact and matters of law have long perplexed the bar and bench. This perplexity may arise in most any case. With the appellate court limited to the review of matters of law, it must of necessity determine which powers of review were used by the

intermediate appellate body, the board of review. The boards being vested with the power to determine both matters of fact and matters of law, it becomes incumbent upon the Court to ascertain which process the board used. The Hendon case, supra, is but illustrative of the problem.

Before the Hendon case, supra, the Court had before it the case of United States v. Bunting.[137] In that case, the accused without provocation suddenly struck a Japanese policeman several times, overpowered him, and appropriated his revolver and ammunition. Proceeding down the street, he broke the headlights out of oncoming bicycles, struck one person with the revolver, shot and seriously wounded two others, and terminated his activities by killing a second policeman by shooting him in the face at close range. The accused did not hide or escape and offered no resistance when apprehended. The facts of record were uncontroverted. The accused testified that he remembered nothing save for one brief fleeting incident. Several medical experts testified as to the mental responsibility of the accused. The two leading experts agreed on many points including a genuine amnesia during the period of the accused's beserk behavior. Doctor L was of the opinion that disassociative reaction had reached psychotic proportions at the time of the acts and that the accused was insane. Doctor P did not believe that the condition had progressed so far as to become a state of psychosis and that the accused was, therefore,

[137] United States v. Bunting (No. 3387), 6 USCMA 179, 19 CMR 296.

responsible for his acts. The trial court found the accused guilty of unpremeditated murder and three offenses of aggravated assault, sentencing him to life imprisonment. The convening authority approved, but a majority of the Navy board of review concluded as a matter of fact, after considering all of the evidence of record, that they had a reasonable doubt as to the sanity of the accused at the time of the commission of the offenses. They set aside the findings and sentence and dismissed the charges. On certification by The Judge Advocate General of the Navy, the Court of Military Appeals considered whether the board of review committed error, as a matter of law, in its analysis of the testimony, thereby abusing its discretion. In summarizing previous decisions, the Court said:

> "We have previously considered the power granted to us by the Uniform Code of Military Justice to interfere with a decision of a board of review, and we have suggested certain limits beyond which our authority does not run. In United States v. Zimmerman, 2 USCMA 12, 6 CMR 12, we recognized our power to review questions of law resolved by a board of review by saying:
>
> "'... Article 67(d), supra [of the Code], explicitly gives to the Court power to act with respect to findings and sentence which have been 'set aside as incorrect in law' by a board of review. A board of review decision clearly based on matter of law, therefore, does not possess such finality that it may be assimilated to court-martial findings of not guilty.'
>
> "It is implicit in the grant of authority found in Article 67 of the Code that a board of review may not permissibly defeat review in this court by labeling a matter of law, or a mixed holding of law and fact, as a question of fact. To avoid that impasse, we look to the substance of the holding, and its rationale, not to the charactization by the board of review. United States v. Benson, 3 USCMA 351, 12 CMR 107. Furthermore, we have consistently held that where a board of review makes a truly factual determination based upon the

evidence of record, we may not overturn it. United States v. Thompson, 2 USCMA 460, 462, 9 CMR 90. When faced with such a determination, we are free only to insist that the holding, if it affirms a finding, be based upon substantial evidence, United States v. Hernandez, 4 USCMA 465, 16 CMR 39, and that the board of review express clearly the exercise of its fact finding powers. United States v. Sell, 3 USCMA 202, 11 CMR 202; United States v. Moreno, 5 USCMA 500, 18 CMR 124."

The Court then turned to the facts presented by the facts of the Bunting case which will be rather fully extracted for the preservation of context. The Court said:

"Here the board of review found that the evidence in the record was insufficient to establish the sanity of the accused beyond a reasonable doubt. The nature of this finding does not permit us to say accurately that the evidence is sufficient to support the finding, for to do so would suggest that we are placing a burden on the accused to establish his insanity. The test we view as more appropriate in this instance may be found in this reasoning: On the one hand, if all reasonable men would conclude that the Government had established sanity beyond a reasonable doubt, then as a matter of law the board of review erred. On the other hand, if all reasonable men would conclude that the accused was insane, a holding to that effect by a board of review would be untouchable. Between the two extremes there exists an area where reasonable minds would differ as to whether the Government had established its burden beyond a reasonable doubt. If the facts place the issue in that area, then the board of review may resolve the conflict either way--in the exercise of its fact-finding powers--without abusing its discretion. ... Had it expressly found the accused sane, the record would sustain the finding. On the contrary, had it found the accused insane, the same situation would exist. The majority made a conscious and informed choice in that area, and surely if the evidence would sustain a finding of insanity, a fortiori, it supports a holding that the Government had not established sanity beyond a reasonable doubt."

In the Hendon case, supra, in determining whether the board of review exceeded its fact-finding authority, what would the result have been had the Court used the test of the Bunting case, supra? By substituting "intended to remain away permanently" for

"insane" into the Bunting test, it would appear to read: On the one hand, if all reasonable men would conclude that the Government had established that H intended to remain away permanently, beyond a reasonable doubt, then as a matter of law the board of review erred. On the other hand, if all reasonable men would conclude that H did not intend to remain away permanently, a holding to that effect by a board of review would be untouchable. Between the two extremes, there exists an area where reasonable minds would differ as to whether the Government had established its burden beyond a reasonable doubt. The Court in Hendon said: "... we do not believe that all reasonable men would agree that Hendon intended to remain away permanently. Some reasonable men could so believe, most reasonable men would, but we cannot say that all would be impelled to do so." The Court was then consistent in placing Hendon between the two extremes and within the untouchable area. But the Court did touch. It had just concluded as a matter of law, that the board erred in holding the court-martial to have erred in returning a finding of guilty of desertion which the Court says was tantamount to holding that as a matter of law the evidence was insufficient to sustain the finding. If it was error to hold as a matter of law that the evidence was insufficient to sustain the finding then it follows as day does the night that the evidence was sufficient to sustain the finding of guilt. The Court so held as a matter of law. How then can findings of fact based upon one identical set of facts be found by reasonable men or otherwise to

be diametrically the opposite? If sufficient as a matter of law, upon what theory or reason can the same facts be found to be insufficient? It is submitted again that this result could not arise under a reasonable man test.

By its holding in Hendon, the Court is saying in effect that a single set of facts are sufficient in law to sustain a conviction of desertion providing the board of review wear judicial robes while making the determination and that the board would err to find otherwise. If the board shed their judicial robes, however, the opposite result may be reached.

If an unauthorized and unexplained absence of one hundred and twelve days, terminated by apprehension, is desertion, as a matter of law, how can it be anything else? Why should one reasonable man be permitted to find otherwise? If one such man was not able to do otherwise, then no multiple of one would be able to do so.

If the same reasoning be applied to the Bunting case, or any other case, the evidence in the particular case is either legally sufficient or it is not.

The writer offers apology for the use of the Hendon case at this time as author of the Government's brief in that case. The foregoing is not intended in any way to present more than an academic discourse on the difficulties encountered within this area. The particular case brought the Court to dealing with the dual functions of the boards of review in a sharply focused situation. It is respectfully submitted that a "maybe yes," "maybe no," solution is

far from satisfactory. Attempting to ascertain which function a board of review performed at a given time is even less satisfactory. The boards are clothed with authority to perform dual functions and there is no reason why they cannot be performed simultaneously. The Court of Military Appeals has but a single function to perform in this area, i.e., to determine whether the evidence is or is not legally sufficient to sustain a conviction. It is most sincerely contended that this determination must always be a matter of law.

In the Bunting case, supra, Judge Brosman, in a separate concurring opinion, stated that if the danger arising from the nonreviewability of captious acquittals by the trial court did not disturb the Congress he could hardly be expected to feel upset about the infinitely more remote risk that boards of review--composed of experienced lawyers--would make wholly unsupported findings of fact in favor of accused persons. He expressed the belief that the Court should refrain from entering into matters which have to do with no more than the weight of the evidence and the credibility of witnesses. The imagination does not need to wander far to envisage more complex problems. Ignorance or mistake of fact may be exculpatory under certain circumstances, whereas it is axiomatic that ignorance of law is no excuse.[138] Imagine the case in which ignorance or mistake of fact is interposed as a defense but within controversial territory as to whether mistake of fact or law. The

[138] Oliver, Ignorance or Mistake of Fact as a Defense in Military Law, JAG Jour., Jan 1957.

board of review must then determine the matters of fact and of law as presented. The Court is then called upon to unravel complexities of the perplexity. It was pointed out in Chapter I that it was not the purpose of the present inquiry to enter into this very complicated field to seek solutions. It is not amiss, however, that the reader's attention be invited to the field.

Again considering the scope of review, within the record, the case of United States v. Thompson[139] offers further enlightenment. This case involved an accused who had positive knowledge on June 7, 1952, that his ship was scheduled to depart on July 7, 1952. On June 17, 1952, the accused commenced an unauthorized absence extending to July 27, 1952. The board of review held there was no proof of a causal connection between the neglect and the missing of the scheduled movement. On certification, the Court held that the board committed error as a matter of law regarding the proof which they required the Government to make. The Court said that if they were reviewing the case de novo, they would say, as a matter of law, that there was sufficient evidence to establish a prima facie case. In remanding the case for reconsideration by the board of review, the Court pointed out that if, aside from the element of causal connection, the board determined there was insufficient evidence to support the finding, it was not the Court's intention to reverse that determination.

[139] United States v. Thompson (No. 1637), 2 USCMA 460, 9 CMR 90.

The opinion uses the following language:

> "Further, as we read the opinion of the board of review, it amounts to a factual determination that there is insufficient evidence to support the findings. If this determination is based solely on an appraisal of the evidence we shall not overturn it. See United States v. Zimmerman (No. 261), 6 CMR 12, decided October 6, 1952. Our jurisdiction is limited to questions of law and we shall, therefore, review the decision of the board of review only insofar as it purports to delineate the legal elements of the offense under consideration."

Court Cannot Render Advisory Opinions.

This case also stands for one further proposition regarding the scope of review. The Court held that it did not have power to answer hypothetical or in vacuo problems and that they were reluctant to arrogate to themselves the power to render advisory opinions.

Certificate by Judge Advocate General Does Not Cause Double Jeopardy.

In a fairly early case, United States v. Zimmerman,[140] the Court held in considering Article 67 of the Code, supra, that sections (b), (d), and (f) are authority for The Judge Advocate General of a service to certify any case to the Court of Military Appeals with no restrictions whatever as to whether the board of review decision was in favor of or contrary to the interests of an accused. The Court held that Article 67(d), supra, explicitly gives the Court the power to act with respect to findings and sentence which have been "set aside as incorrect in law" by a board of review. They reasoned that a board of review decision clearly

[140] United States v. Zimmerman (No. 261), 2 USCMA 12, 6 CMR 12.

based upon matter of law does not possess such finality that it may be assimilated to court-martial findings of not guilty. The Court reserved consideration of the question of whether board of review disapproval for lack of sufficiency of the evidence as a matter of law possessed that finality.

This same case was previously before the Court.[141] Initially, the accused, upon trial by special court-martial, pleaded guilty to, and was found guilty of, unauthorized absence for a period of ten days and missing a movement of his ship. He was sentenced to a bad conduct discharge and confinement at hard labor for three months. The convening and supervisory authorities approved. A Navy board of review disapproved the findings and sentence. Upon certification of The Judge Advocate General, the Court decided that the procedural errors asserted by the board of review were not prejudicial to the accused. The Court did find an improper presentation of prior convictions in the record which could have influenced the trial court in arriving at a sentence. The Court thereupon remanded the case to The Judge Advocate General "for action not inconsistent with the views expressed" by the Court. It would have been possible to refer the case to the board of review for consideration of an appropriate sentence without the improperly considered prior convictions. On motion of appellate defense counsel, the board ruled that the principle forbidding double jeopardy precluded the reinstatement of any part of the

[141] United States v. Zimmerman (No. 261), 1 USCMA 160, 2 CMR 66.

sentence and therefore its prior holding on dismissal would have to stand. Again, the matter was certified to the Court. In addition to the proposition set out above, the case is authority for the proposition that action by a board of review reinstating a conviction consistent with the decision and mandate of the Court of Military Appeals and approving such part of the sentence as was found correct does not violate Article 44, Uniform Code of Military Justice, or the Fifth Amendment to the Constitution of the United States. The Court found that there was no trial and hence no jeopardy, until the finding of guilty has been affirmed by the last appellate tribunal to consider it. The action of the board of review directing dismissal on a point of law was interlocutory only until appeal or an expiration of the time for appeal. The Court then said:

> "Here the case has been twice before a board of review, will return for further consideration, and will have been twice passed on by this court. However, no matter how lengthy the process, and regardless of the number of times a case may pass between a board of review and this court, the fact remains that the sum constitutes one appellate review of one case .... Different problems have been involved, it is true, but one case has been the subject of one appellate review. Until all possible and proper aspects have been considered, the appellate review is incomplete and no jeopardy can possibly have attached."

The Court thereupon turned its consideration to the possible effects of the Fifth Amendment to the Constitution of the United States. First the Court cites a number of Federal court decisions showing that the courts have been divided on the question of whether this amendment applies of its own force to personnel of the

military establishment, noting that the Supreme Court of the United States had in cited cases avoided the question. The Court mentioned Wade v. Hunter[142] wherein the Supreme Court expressed a "tacit understanding that the Fifth Amendment does apply to military persons." The Court did not determine this point but passed on to other considerations which narrowed to, "assuming arguendo that this certification by The Judge Advocate General amounts to an appeal by the prosecution ... would such appeal violate the accused's guaranty against double jeopardy?" The Court thought not. The Court showed that, at the time of the adoption of the Constitution and the original amendments, prosecution appeals in criminal cases were wholly unknown, and it was of no matter that a trial court erred in questions of law as distinguished from questions of fact. The older cases based upon different reasons held quite uniformly that there was no right of appeal by the Government in criminal cases. Considerably later and after a transition of statutory provisions, the Supreme Court held in United States v. Gulf Refining Co.[143] that certiorari on behalf of the United States would lie to review a Court of Appeals reversal of a criminal conviction. The Court cites numerous cases picked at random wherein Court of Appeals reversals were in turn reversed and the causes remanded for further proceedings in conformity with the Supreme Court opinions but without advertence

[142] Wade v. Hunter, 366 U.S. 684.
[143] United States v. Gulf Refining Co., 268 U.S. 542.

accused persons was wholly unknown. ... For the present purpose, therefore, we hold that automatic board of review consideration on behalf of a convicted military person is tantamount to intermediate appellate review sought by the accused himself--this for the reason that the dangers of double jeopardy have been eliminated. A guaranty against evil is not contravened by a procedure which precludes that evil."

The Court and Matters of Fact.

The Court made a comment in the Dickenson case,[144] per Chief Judge Quinn, which is worthy of note. He said:

"While we can disregard testimony which is inherently incredible or manifestly unbelievable, we have no power to decide conflicts in the evidence or to weigh the testimony of one witness against that of another. We have authority to review the evidence only for the purpose of determining the ultimate legal effect. The only question for our consideration here is whether there is substantial evidence in the entire record of trial to support the findings of guilty. United States v. Dodd, 2 USCMA 94, 6 CMR 94; United States v. Logas, 2 USCMA 489, 9 CMR 119."

One other thought will be suggested in this area. The writer once heard a Federal District Judge instruct the jury in a criminal case: "Gentlemen of the jury: In this case it is within your power as jurors to acquit the defendant. As American citizens, you do not have the right to do so." Without analogizing or condoning the instruction, would not a power and right concept be helpful to the court? There can be no question but that boards of review have the power to approve, partially approve, or disapprove findings. The only restraint upon this power is that their actions must not be capricious, arbitrary, or one which no reasonable man could reach. The Court has reversed board of review decisions, which but for the appellate court review, would have effectively acquitted

144 United States v. Dickenson (No. 6238), 6 USCMA 438, 462, 20 CMR 154.

to any possible conflict with the Fifth Amendment. The Court points out that a waiver of guaranty may serve as a foundation for these cases as only the defendant can appeal to the Court of Appeals. He cannot complain of his own actions. The Court then says:

> "It follows that, if the Court of Appeals erred in reversing the conviction, it may thereafter be affirmed without the necessity for retrial and without contravening guarantees against double jeopardy."

Turning back to the military system, the Court of Military Appeals notes the provision for automatic consideration by a board of review and reasons that since there is no provision for appeal to the intermediate tribunal by an accused, no notion of waiver is available to sustain prosecution appeals. The Court then continues to say:

> "However, action by a board of review is always taken on behalf of an accused and in his interest. Literally he can never be prejudiced by this appellate review--for on retrial, if any, he cannot be tried for an offense greater than that charged at the first trial, nor can he receive a sentence greater than that adjudged at the first trial. ... Since prejudice is impossible under this procedure, the evils contemplated by and even prompting the guaranty against double jeopardy are entirely inoperative. The provision for automatic review simply constitutes the device adopted by Congress for insuring that no man may stand convicted on an inadequate record. To rule that the consequences of its action contravene the Fifth Amendment would be palpably absurd and would operate to penalize the legislative interest in insuring justice to members of the armed forces to the utmost extent possible. To put the matter in another way, the Fifth Amendment was intended to codify the common law principle against double jeopardy. During the period this principle was being formulated--and doubtless at the time of the Amendment was adopted as well--automatic review on behalf of convicted

the accused. Is this not saying in effect that the board, although having the power to make such a determination was legally restrained from doing so? Whether the terminology of rights, duties, privileges, or powers be used, is the Court not saying there are additional legal limitations by which the decisions of boards of review will be governed? If sufficiency of the evidence is but clearly recognized as a matter of law, then the Court need not attempt to draw fine lines of distinction. The Court need only find that the evidence is or is not sufficient to support the decision of the board of review, as a matter of law. This does not imply that rigid or fixed standards must be established by which all cases of mental responsibility are to be measured. Each case should stand on the content of its own record. The same would be true of the desertion case. If any inference is legally justifiable from the length of the absence, when unexplained, there would be little damage in the Court finding that a given number of days would be sufficient as a matter of law whereas less than that number would be insufficient. The variables as to what explanation would refute the inference would remain.

Clearly boards of review have the power to judge the credibility of witnesses which the Court does not share. It is commendable that the Court has scrupulously refrained from infringing upon this power. The same problem confronts the Court in this area as in the matter of weighing evidence. If no reasonable man could give credence to the testimony of a particular witness, there can

be little doubt but that the Court would find that a board of review would err in extending credibility to the testimony of that witness. In contrast, if all reasonable men would give credence to a particular witness, a board would err not to so do. In between, in that area where reasonable men might differ, the boards would be at liberty to believe or disbelieve a given witness without the slightest likelihood of reversal by the Court. The credibility of most witnesses would fall within the wide space between the two extremes. There is very little that can be added to the previous discussion. The Code admonishes that boards of review should recognize that the trial court saw and heard the witnesses. From a practical standpoint, the credibility of a witness is inextricable from the weight to be given to his testimony. A board of review sitting in Washington, D. C., is rather handicapped in attempting to evaluate the testimony given by witnesses at a trial conducted in Japan, Germany, or even in an adjoining room. Appellate courts in general, whether intermediate or of last resort, whether state or Federal, review only as to errors in law. There seems to be little justification for granting boards of review broader powers than are entrusted to the Court of Military Appeals. The difficulties which the Court has encountered in this area would be effectively removed if Congress would merely limit the powers of the boards to that granted to the Court.

MATTERS WHICH WOULD ORDINARILY APPEAR WITHIN THE RECORD.

A line of cases will be encountered which, at first blush, give the impression of being departures from the general holdings

which have thus far been discussed. These cases appear to look outside the record of trial at both board of review and Court levels. It is believed that three cases will serve to show that such cases do not actually constitute exceptions to the general proposition that review is limited to the record of trial as to findings.

In United States v. Walters,[145] the accused officer was charged, among other charges, with having conspired to defraud the West German Republic of certain tax receipts, unlawfully accepting gifts and having made a false official statement. A general court-martial returned findings of guilty which the convening authority approved. An Army board of review approved part of the findings. The Court of Military Appeals granted a petition for review to determine whether the accused had been prejudiced by cumulative error, or by unauthorized conferences between the law officer and certain court members--and whether an erroneous instruction concerning maximum sentence had been given. The occurrence of the unauthorized conferences was not revealed in the record originally prepared but through certificates executed by various participants at the direction of the convening authority following complaints by the civilian counsel who represented the accused. These were attached to the record and considered by the staff judge advocate and the convening authority. Judge Brosman, writing for the majority of the Court, points out that an omission from a trial record involving

[145] United States v. Walters (No. 3734), 4 USCMA 617, 16 CMR 191.

a deliberate suppression would be a fraud upon the court, and as such, grounds for a new trial. In some instances, the failure of a reporter would be obvious from the record itself but in other areas, such as the one under consideration, there would be no clue within the record. As to possible remedial action, Judge Brosman says of a petition for new trial:

> "Yet it is hard to see how proof of lacunae in a record can be said to fall within the category of newly-discovered evidence under Article 73--or even in most cases within the ambit of what is deemed a 'fraud on the court.'"[146]

The Judge then discusses the use of a certificate of correction as provided in the Manual. He expresses the view that liberality is demanded regarding claims of omissions from the record to the end that cases may be fully reviewed as directed by Congress and states:

> "...we have here no problem of a clash between a properly authenticated certificate of correction relied on by the Government, on the other hand, and affidavits submitted by the defense on the other. Contrariwise, it seems conceded that certain events occurred, and the only issue is whether those events may properly be considered by this court.
>
> "We doubt that we shall be met in the future with frequent 'battles of affidavits' by reason of this decision to consider omissions from a record of trial, although raised in a manner other than by certificate of correction ...."

The Court then determined that it would treat the matters related in the personal certificates, although not in compliance with the Manual, as if they had been reported in a formal certificate of

[146] UCMJ, Art. 73, which provides: "At any time within one year after approval by the convening authority ... the accused may petition The Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. ..."

correction. They then determined that the events related were a part of the trial court's proceedings open to review by the Court. The Court distinguished the Harvey case,[147] wherein they refused to consider new evidence unearthed after the trial, but attached to the record at the time of the staff judge advocate's review, on the basis that the evidence did not relate to proceedings of the trial court and could not conceivably have been considered in reaching the findings of guilt and imposing the sentence.

Judge Latimer, concurring in part and dissenting in part, found that the certificates filed at the level of the convening authority were properly a part of the record on appeal and properly before the Court but that the affidavit filed after the record reached the Court was not. Judge Brosman had not excepted this document, saying that it merely corroborated the others. Judge Latimer refused to adopt the certificate of correction approach, labeling it as artificial and reached the same end result, saying:

> "The criteria I would rely on to determine whether the documents reflecting out-of-court irregularities are in the record on appeal and can be considered by us are the time and manner in which the issues were raised and by whom they were decided. The Code recognizes that matters dehors the record may be raised properly before a board of review, and before this court, by a petition for a new trial, and these petitions may be founded on circumstances and events which occurred prior to findings. In petitions for new trials, certificates of correction need not be used to frame the issues; and I fail to see why written documents composed in any legal and recognizable form, which are filed with the convening authority and which seek to invoke his power to correct injustices that brought about an unfair trial, should not be considered as petitions for rehearing."

[147] United States v. Harvey (No. 1625), 2 USCMA 609, 10 CMR 107.

Judge Latimer then proceeds to point out a preferable practice which would be the filing of a petition for rehearing fortified by affidavits in support of the grounds alleged. Service upon the Government would afford opportunity to meet the issues. The action of the convening authority, the pleadings and the evidence would thereby become a part of the record on appeal. The basic dissent went to the merits in this case with the dissenting Judge concluding that the accused was entitled to all or nothing and that he would affirm the findings and sentence whereas the majority found prejudicial error and ordered a rehearing.

Passing from the Walters case, supra, consideration will next be given to the case of United States v. Ferguson et al.[148] In this case, the several accused were convicted of a mutiny occurring at a post stockade. After conviction and sentence, the findings and sentences, as mitigated, were approved by the convening authority and forwarded to an Army board of review. While the matter was pending before the board of review, the staff judge advocate forwarded to The Judge Advocate General of the Army a transcript of statements made at a conference held the day before the trial commenced. Present at the conference, in addition to the staff judge advocate, were the convening authority, the chief of staff, the law officer, a recording officer, and members of the court-martial. The staff judge advocate described generally the duties of court-martial members and included in his remarks a discussion of the

[148] United States v. Ferguson (No. 3289), 5 USCMA 68, 17 CMR 68.

offenses prevalent in the command. Reference was made to "dissident elements" and "people who are not responsive to discipline" and "trouble makers" within the stockade. The court-martial members were told that "more cases like this are in the offing"; that it was essential "that the case be handled promptly, expeditiously"; that they "act firmly" otherwise the situation in the stockade would be aggravated leading to further outbreaks and disturbances which was the sort of thing that adversely affects the command and leads to poor publicity. Among other certified questions, the Court was requested to determine whether the board of review, as a matter of law, had the right to consider the transcript. The board had determined that it had such right as the matters presented pertained to jurisdiction and that the pretrial conference reflected command control over the members rendering them incompetent to hear the case, wherefore the proceedings were rendered null and void. The board ordered that the convening authority might direct a new trial before another court-martial.

All three members of the Court agreed that "command control" was present but that the error was not jurisdictional. The Court returned the case to The Judge Advocate General ordering a rehearing, although Judge Latimer concluded that he would reverse the decision of the board of review and reinstate the findings as returned by the court-martial and affirmed by the convening authority. His reasoning was that the board of review was without power to consider the transcript except on the question of jurisdiction. The

error not being jurisdictional, he would have returned the record to the board of review on the record without considering matter contained in the transcript. Chief Judge Quinn, by separate opinion, stated that the rule that an appellate tribunal will not consider questions not raised in the trial forum is only a rule of expediency and that one of the well-recognized exceptions to the general rule is that "questions of a general public nature affecting the interest of the state at large may be determined by the appellate court without having been raised in the trial court." He considered a question of command control to be a matter which gravely affects the military community and further reasoned that there was no contest as to the accuracy of the transcript in the case before them. It would have netted the same result if it had been considered at the trial level and thereby been reviewable by the board. He would have considered the transcript regardless of whether it was a part of the record and apparently would not have limited its consideration to jurisdiction. Judge Brosman, also by separate opinion, was convinced that the board of review could have considered the transcript quite apart from any question of jurisdiction and that once considered the command influence shown constituted prejudicial error. He suggested that the conference held but a day before was a part of the proceedings as held in the Walters case, supra. Another suggestion was that the transcript was forwarded to the board by The Judge Advocate General under authority to hear and report to him as provided by Rule IXF, supra

One other facet of this case may be of interest. Judge Latimer reiterated his belief that the proper method of bringing matter outside the record before the Court would be on motion for new trial. He then went on to say:

> "In this instance the method of raising the error is not a matter of form, it is a matter of substance. If the accused were successful in raising the pretrial conference as a matter of prejudicial error on direct appeal, they might obtain a rehearing with a ceiling on the punishment, or a reduction in sentence by the board of review. If they proceeded by a motion for a new trial, the sentence would be undisturbed if the petition was denied. If it was granted on jurisdictional grounds and the accused were retried, they would not have the protection given by the Code prohibiting the increase of sentence. I can aptly illustrate what would happen in this instance were we to hold the claimed error divested the court-martial of jurisdiction. Two of the defendants who have served a goodly portion of their two-year sentence could be retried and sentenced to the maximum term of confinement. It would thus be trading a fixed and partially served sentence for a possible death sentence; and similar fate would face the other accused. From my review of the facts, it is entirely probable that I would work a grave injustice on all accused by holding that the proceedings were null and void."

Judge Latimer has thus sounded a warning which all defense counsel might well heed in determining the method by which the Court is approached if dealing in that delicate area involving jurisdictional defects which will be considered later herein. It will have been noted that Judge Latimer and Judge Brosman were not able to agree wholly in their approaches to these cases. Chief Judge Quinn expressed an independent view which may be considered as a middle or in-between view.

The next case to be considered is of particular interest because it is authored by Judge Homer Ferguson with Chief Judge Quinn

and Judge Latimer concurring. The case actually turned upon jurisdictional grounds but is worthy of consideration for the language used by the author judge. The case is United States v. Roberts.[149] The accused was convicted by general court-martial of desertion resulting from a prolonged absence of about eleven years. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for fifteen years. The convening authority approved but reduced the confinement to ten years. An Army board of review reduced the confinement to six years. After the board of review had acted in the case, the convening authority forwarded a letter to the Chief, Defense Appellate Division, Office of The Judge Advocate General of the Army, stating in substance that he had personally delegated to his staff judge advocate authority to refer the case for trial and that the staff officer and not the commander made the decision. The same information was contained in one of a number of affidavits attached to the pleadings in the case. This the Court considered as going to jurisdiction and reversed the decision of the board of review and returned the record for a rehearing.

Judge Ferguson had this to say:

> "In connection with appellate exhibits generally, we feel it appropriate to point out that certain distinctions must be drawn. Where such an exhibit contains new evidence or new matter which was not before or was not considered by the trial court or the reviewing agencies, this court follows the almost uniform civil practice and generally will not consider it. Ordinarily appellate courts review claimed errors only

[149] United States v. Roberts (No. 7738), 7 USCMA 322, 22 CMR 112.

on the basis of the error as presented to the lower courts. ... However, this court will review material outside the record having to do with insanity, United States v. Bell, 6 USCMA 392, 20 CMR 108, and jurisdiction, United States v. Dickenson, 6 USCMA 438, 20 CMR 154.

"The other category of appellate exhibits actually amounts to what is usually referred to as a supplementary or additional designation of record. That is, it involves some procedure or occurrence which ordinarily would be included in the record of trial and other proceedings that come before this court for review but which is missing therefrom by way of mistake, inadvertence, or otherwise. In this latter category, the only question involved is whether such occurrence in fact took place. If so, and if pertinent, it is entitled to be made part of the record of the proceedings before this court. There may of course be circumstances where--when such a correction is made for the first time at this level--we will return the entire record for primary decision at the appropriate level. Nevertheless civil courts generally and the Federal courts in particular provide the necessary measures to insure that a complete and correct record is before the appellate court. See Rule 75(h) of the Federal Rules of Civil Procedure, which also applies to the Federal Rules of Criminal Procedure (Rule 39). This does not mean that we are not fully aware of and in complete accord with the function provided for by a Certificate of Correction (paragraph 86c, Manual for Courts-Martial, United States, 1951). But the use of such certificate appears to be permissive in nature, merely one method of correcting a record, not the exclusive means. United States v. Self, 3 USCMA 568, 13 CMR 124."

From the foregoing cases, it is quite apparent that Chief Judge Quinn will have no disposition to consider matters outside the record which were not raised at the trial level unless the matter is of a general public nature which gravely affects the military community. Judge Latimer has expressed an unwillingness to look outside the record when the matter would more appropriately be raised by motion for new trial. He has not indicated a disposition to require strict compliance with the procedures moving for new trial

or for correcting records. The expressions of Judge Ferguson indicate a basic and more fundamental unanimity among the three members of the Court than has prevailed in this particular area. It would be idle speculation to go further into prognosticating the future.

SENTENCES.

At the commencement of this chapter, it was thought to be preferable that consideration be given separately to "findings" and to the "sentence." To this point in the discussion, attention has, therefore, been directed toward the findings. At this juncture, the discussion will point toward the sentence.

Historical.

The historical background of Article 66(c) and (d) of the Uniform Code of Military Justice, supra, shows that boards of review were not empowered to deal with sentences until the enactment of the Code. The Congress contemplated that such power would work to establish a uniformity of sentences throughout the Armed Forces. The traditional powers which have always been possessed by convening authorities were preserved unto them by the Code. Judge Brosman very aptly summarized the power of the convening authority in pointing out that he is not limited in the sources from which he may obtain information upon which to form an opinion as to the appropriateness of a particular sentence but may, if he desires, consult "a guy named Joe."[150] The Code provides, however, that

[150] United States v. Coulter (No. 2786), 3 USCMA 657, 663, 14 CMR 75.

boards of review will look only to the "entire record"[151] in its determinations. It will be necessary, therefore, to make inquiry into the meaning of the term "entire record" and to the extent to which the boards have been empowered to deal with sentences.

Entire Record--Broader Than Record of Guilt or Innocence.

In a recent case, United States v. Lanford,[152] Chief Judge Quinn considered the over-all problem presented. He there said:

> "In the first instance the sentence is fixed by the court-martial. The court, of course, will normally act on the evidence presented to it. The sentence imposed by the court is not final. It cannot be increased, but it may be mitigated by the reviewing authorities. The question then arises as to whether the interests of justice require these reviewing authorities to look no further than the trial proceedings for facts which would justify a reduction in the sentence. It seems to us that an accused would be the last person to urge that rule. In any event, we think that the law is less harsh. In our opinion, justice is fostered by giving the reviewing authorities power to go outside the record of trial for information as to the sentence. See Rule 32(c), Federal Rules of Criminal Procedure. Its purpose is to benefit, not to harm, the accused. But what of a case like this one in which some of the extra-trial facts militate against a reduction in the sentence? Would not consideration of these facts harm the accused by persuading the reviewing authorities to affirm the sentence imposed by the court-martial? The answer is necessarily 'yes.' But, it must be remembered that appeal from the court-imposed sentence is a matter of legislative grant not of inherent right. Congress might have provided that a legal sentence adjudged by a court-martial cannot be altered in any way by a reviewing authority. Instead, it chose to provide a procedure under which the court's sentence can be materially reduced. This procedure insures justice; it does not defeat it. We conclude, therefore, that contrary to the accused's contention, the words 'entire record' mean more than the evidence presented at the trial. In fact, previous decisions of the court clearly indicate that a board of review may look beyond the trial record for mitigating evidence."

[151] UCMJ, Art. 66(c).

[152] United States v. Lanford (No. 6540), 6 USCMA 371, 379, 20 CMR 87.

The Lanford case from which the foregoing quotation was taken was a Navy case tried before a special court-martial wherein the accused was charged with an unauthorized absence of approximately eleven hours. The accused pleaded guilty and during the sentence procedure, two previous convictions were introduced into evidence. He was sentenced to a bad conduct discharge and to confinement at hard labor for one month. The convening authority approved but suspended the execution of the discharge for the period of confinement and five months thereafter. In approving the sentence, the convening authority in his action on the record, stated that he had considered the entire service record of the accused, which, with commendatory items, also included a list of nine nonjudicial punishments. The defense moved to strike the references to the nonjudicial punishments from the record. The board denied the motion but held that it could not and would not consider the additional information in its deliberation on the sentence. On the basis of the offense charged, the eleven-hour unauthorized absence, and the two prior convictions, the board decided that the sentence was inappropriate and affirmed only the period of confinement. The action of the convening authority complied with a directive of the Chief of Naval Personnel, BuPers Instruction 1626.13 of October 7, 1954, by including in his review a synopsis of the conduct record of the accused. Army and Air Force requirements for a post trial interview reach a similar design. The Judge Advocate General of the Navy sought review by the Court of Military

Appeals to determine whether the board of review was correct in refusing to strike the nonjudicial punishments from the record; whether the board should have considered all of the matter contained in the synopsis in its determination of the appropriateness of the sentence; whether the board was authorized to exercise clemency and to what extent; and whether the board should consider all of the matter contained in the synopsis in its decision as to whether or not to exercise clemency. In dealing with the certified questions, the Court has given a comprehensive coverage to the matters presented which, in turn, is the subject of the present inquiry.

In dealing with the questions submitted, the Court, although indicating that reviewing authorities have the power to go outside the record of trial for information as to the sentence, seems to be really saying that certain matters which become appended, attached as allied papers, or are supplementary to the record of trial, become a part of the "entire record" for the purposes of review as to the sentence. In support of this position, the decision points out that neither the Code nor the Manual prohibit the convening authority from detailing his reasons for approving a sentence. In granting a review of his action as to the appropriateness of the sentence, the Court reasons that reviewing authorities should have the benefit of those factual matters which he considered but which were not admissible into evidence as to the guilt or innocence of the accused. As was previously determined, there is practically

no limitation as to what the convening authority might take into consideration. It follows that whatever he considered he could recite in his action on the record and thereby incorporate those matters into the "entire record." It might be less confusing if the record of trial were to be designated as "the file" of the case after the court-martial had arrived at a sentence. Judge Latimer, in a separate concurring opinion, comments:

> "It would be strange law indeed if a convening authority could exercise his powers in silence without infringing on a privilege of an accused, yet if he speaks out, an accused's right has been violated. That such a ruling would be abused can well be established. In the first instance, the accused has no possibility of undermining the base supporting an affirmance. In the latter instance, he has been furnished an opportunity to rebut the truthfulness or accuracy of the supporting evidence, even though the occasion may be late. If an accused has reason to believe that information furnished to the convening authority is not founded in fact he can submit to that officer his rebuttal evidence. If he is uninformed, he can prepare the way before action by explaining any unfavorable entries appearing in his service record. It may well be that he must take the initiative, but that is a burden he must assume.

Judge Latimer further recognizes the possibility of the convening authority going beyond the service record and obtaining information from doubtful sources--possibly consulting "Joe." To this he rationalizes that the accused is requesting a favorable discretionary ruling to which he has no right to an explanation of its denial; he may submit his version of disputed matters for reconsideration; but in any event legally trained board members should be able to evaluate properly what is presented to them.

The Chief Judge reviews previous cases[153] considered by the Court wherein distinctions were apparently drawn between the appropriateness of a sentence and the exercise of clemency. He concludes:

> "The name by which the board's power is denominated is really unimportant. What is important is that within the limitations of its own authority, the board of review can, in the interests of justice, substantially lessen the rigor of a legal sentence. The board of review, therefore, can be compassionate; it can be lenient; it can be forbearing. If one prefers to call the influence of those human qualities in the mitigation of a sentence the exercise of the judicial function of determining legal appropriateness the description is proper. ... On the other hand, if one wishes to call it clemency, that description also is proper."

In the light of this decision, the conclusion is reasonably drawn that the Court has resigned themselves to less bickering about terms with a recognition that boards of review may exercise clemency in conjunction with a judicial determination as to the legal appropriateness of a sentence. The Court remanded the principle case to The Judge Advocate General of the Navy for submission to the board of review for reconsideration of the sentence. The net effect would be that the board of review would take into consideration

[153] For other cases in this area which the Court considered and which are not discussed, infra: United States v. Jones (No. 79), 1 USCMA 302, 3 CMR 36; United States v. Reeves (No. 453), 1 USCMA 388, 3 CMR 122; United States v. Keith (No. 226), 1 USCMA 442, 4 CMR 34; United States v. Brasher (No. 499), 2 USCMA 50, 6 CMR 50; United States v. Duffy (No. 1404), 3 USCMA 20, 11 CMR 20; United States v. Whiteman (No. 2168), 3 USCMA 179, 11 CMR 179; United States v. Fleming (No. 2727), 3 USCMA 461, 13 CMR 17; United States v. Cavallero (No. 2774), 3 USCMA 653, 14 CMR 71; United States v. Coulter (No. 2786), 3 USCMA 657, 14 CMR 75; United States v. Walters (No. 3734), 4 USCMA 617, 16 CMR 191; United States v. Clisson (No. 4635), 5 USCMA 277, 17 CMR 277; United States v. Long (No. 5503), 5 USCMA 572, 18 CMR 196; United States v. Parker (No. 5759), 6 USCMA 75, 19 CMR 201.

the nine nonjudicial punishments of which it was previously cognizant but refused to consider. It could then approve the punitive discharge as suspended by the convening authority or, by the exercise of clemency in its determination of legal appropriateness, approve only the confinement as it did in the first instance.

The Court of Military Appeals lacks the power to determine the appropriateness of a sentence.[154] Its power, as has been shown, stems from Article 67(d) of the Code, supra, providing that the Court shall take action only with respect to matters of law. In the absence of a sentence exceeding maximum legal limits, the Court is without authority to determine what portion of a sentence should be approved.[155] This oft-repeated generalization will bear further consideration.

Death Sentence Reduced.

In the case of United States v. Bigger,[156] the accused was found guilty of premeditated murder by the trial court and was sentenced to be executed. The board of review affirmed only so much of the finding as found the accused guilty of unpremeditated murder and approved only so much of the sentence as provided for a dishonorable discharge and confinement at hard labor for life. The Judge Advocate General of the Army submitted the case to the Court for a determination as to the legality of the action of the board of review in changing the death sentence. The defense urged that the board's action was an illegal act since the boards of

154 United States v. Cousae (No. 2780), 3 USCMA 793,797, 14 CMR 211.
155 United States v. Keith (No. 226), 1 USCMA 442, 451, 4 CMR 34.
156 United States v. Bigger (No. 456), 2 USCMA 297, 8 CMR 97.

review had no authority to commute, as distinguished from determining appropriateness or granting clemency. It was contended that such power had been delegated exclusively to the President and Secretaries of the Departments by Article 71(a) and (b) of the Code and paragraph 105 of the Manual. The Court concluded that the action of the board did amount to commutation. They found, however, that premeditated murder and the sentence of death were so inextricably intermixed that the death sentence could not stand when the finding was reduced to a lesser offense. The Court concluded that Congress intended to authorize boards of review to affirm findings of guilty of lesser included offenses and that, if by so doing, it must have intended to permit the board to substitute a lesser legal sentence. It appears, therefore, that boards of review do possess the power of commutation in at least this one situation.

The Bigger case, supra, suggests a question as to whether the power of commutation might find application in a situation where a death sentence was predicated upon more than one finding of guilt although the board should reduce one of the findings. Such a situation was presented to the Court in the case of United States v. Freeman.[157] In that case, two accused were tried jointly by general court-martial in Germany. Each of two specifications under the first charge alleged the joint rape of two separate women. The single specification of Charge II alleged a joint assault with a dangerous weapon upon the husband of one of the rape victims. Both

[157] United States v. Freeman (No. 3211), 4 USCMA 76, 15 CMR 76.

accused were found guilty as charged and sentenced to death. The convening authority approved the findings and the sentences. A board of review in the Office of The Judge Advocate General of the Army reduced the finding of guilty under one of the rape specifications to joint assault with intent to commit rape. The death sentence was affirmed by the board but its members forwarded a recommendation that the sentence as to each accused be commuted to a dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for life. The case was before the Court on mandatory review of the death sentences. Judge Latimer, in writing for a unanimous Court, said:

> "At best the board had three possible alternatives. First, it could affirm the sentence as originally imposed; second, it could affirm the sentence and recommend that clemency action be exercised by those in whom such authority was vested; and third, it could direct a rehearing, if sentence could not be justified reasonably upon the affirmed findings. We think the board was correct in its decision to reject the third alternative. The facts we have previously related show that the offenses committed by the accused were of a violent and heinous nature. The offenses were established beyond peradventure of doubt, and there is not the slightest semblance of a defense suggested. ..."

Dismissal--Powers Regarding.

The next question with which the Court was confronted in this area was whether a board of review had the power to reduce a sentence of dismissal to a loss of numbers. The issue arose out of the case of United States v. Goodwin.[158] The accused officer was found guilty of one charge of assaulting a shore patrolman in the

[158] United States v. Goodwin (No. 5868), 5 USCMA 647, 18 CMR 271.

execution of his office under Article 128 of the Code and of a charge of being drunk and disorderly in station under Article 134. The court-martial sentenced him to be dismissed from the service. The convening authority approved the sentence. A Navy board of review affirmed the findings of guilty but concluded that the sentence was inappropriate and commuted the sentence to the loss of two hundred unrestricted numbers. The Judge Advocate General's Certificate presented the issue as to the power of a board of review. Pending appellate review, the Secretary of the Navy, acting independently of the board of review, commuted the sentence to a loss of two hundred numbers. The Court proceeded with its review. It recognized that the board of review had acted under a misapprehension regarding the imposable punishments but then turned its attention to the certified question. The Court noted that Congress did not use either the term "commute" or "mitigate" when it granted boards of review the power to consider the appropriateness of sentences. It turned attention to the historical distinctions which had existed in the military services until the enactment of the Code. After tracing the legal background through various changes in the law, a majority of the Court noted that a difference had been maintained by granting to officers inferior to a Secretary of a Department only the power to reduce or mitigate sentences but at the same time gave to the President or to the Secretary of the Navy the authority to commute or change their nature. In 1949, for the first time someone other than the President or a Secretary of the Department could commute a dismissal to some other form of punishment. The Court said:

> "For a short period of time the Judicial Council could change the form of the sentence and the nature of the punishment. However, when Congress eliminated the Judicial Council, the board of review did not fall heir to its powers. Only a specific delegation of authority by Congress would vest the board with authority to substitute punishments."

The Court then turned its attention to the provisions of the Code which they interpreted as permitting affirmation of a sentence or such parts as should be approved but found that such grant does not offer any power to resentence the accused to another form of punishment. The Court concluded by saying:

> "In hopes we will state the law as it is now provided for in the Code, and restate what we believe the law always has been in military services, we sum up our views. Specifically, only the Chief Executive and the Secretaries of the Departments or their Assistants, if so designated, have the power to change a dismissal from the service to any other form of punishment. Only the President can change a sentence of death to confinement for life or a term of years. Generally, the President and the enumerated Secretaries and their Assistants alone can commute a sentence, and we use the word 'commute' in its generally accepted sense, that is, change in form. Mitigation we restrict to a reduction in kind."

Chief Judge Quinn strongly dissented, expressing the view that he thought Congress intended to confer upon the board of review the power to approve a sentence, which, while not necessarily a part of the whole, is lesser in amount than that adjudged by the court and approved by the convening authority. He points out that one of the alternative courses previously suggested by the author Judge in the Freeman case, supra, was to order a rehearing whereby the board of review could accomplish indirectly what the majority hold could not be accomplished directly. He states:

"The board of review was constituted as the authority to determine the appropriateness of any sentence, whatever its nature, and to cut down that sentence in any amount, if it determined that the adjudged sentence was too severe. ...

"The real issue in this case is not to distinguish between commutation and mitigation, but whether loss of numbers is a punishment which is a lesser 'amount' than dismissal. See United States v. Kelley, 5 USCMA 259, 17 CMR 259. Plainly, it is. However, even if the question is considered from the standpoint of the difference between commutation and mitigation, the action taken by the board of review is proper."

The Chief Judge then quotes from a unanimous opinion of the Supreme Court of the United States in the Mullan case,[159] where the Supreme Court held that changing of a sentence of dismissal to a loss of numbers was exercising the powers of mitigation. He concludes that what was mitigation then is still mitigation. The majority had distinguished the Mullan case on the basis that the law had changed; that the Supreme Court conceded a difference between mitigation and commutation; and that the President possessed both powers in the Mullan case.

Prior to the above case, the Court of Military Appeals had considered another case, wherein the sentence provided for dismissal.[160] In United States v. Voorhees, the accused officer stood convicted of five violations of the Uniform Code which grew out of certain of his writings of experiences in Korea. A divided board of review set aside all of the findings of guilty except for one single offense. The board affirmed the sentence of

[159] Mullan v. United States, 212 U.S. 516 (1909).
[160] United States v. Voorhees (No. 3226), 4 USCMA 509, 16 CMR 83.

dismissal and total forfeitures as appropriate for the finding affirmed. The dissenting member would have dismissed all of the findings of guilty. In view of the dismissal of all of the major charges and the failure of the board of review to order a rehearing before the trial court, the Court reversed the decision of the board of review and ordered a rehearing on the one remaining charge. Judge Brosman dissented and would have dismissed the remaining charge. Judge Latimer wrote a separate opinion concurring in part and dissenting in part from the author Chief Judge. He expressed the view that the board could not compensate by a reduction in sentence for the findings which it reversed. He believed that a rehearing by the court-martial was not only appropriate but was mandatory under the circumstances. The board of review had no power to change the type or nature of the sentence and was thereby precluded from making the punishment fit the crime. The board should not have passed upon the appropriateness of the sentence. As to returning the case to the board, he reasoned that he would be compelled to hold that the board erred if it were to again affirm the sentence. The sentence should be considered by a judicial body which did have free choice of an appropriate sentence.

The respective positions of the present membership of the Court of Military Appeals is brought out in the case of United States v. Stene.[161] Judge Latimer has written the opinion of the Court with the concurrence of Judge Ferguson. Chief Judge Quinn

[161] United States v. Stene (No. 8325), 7 USCMA 277, 22 CMR 67.

retained the position which he had taken in previous cases and registered a strong dissent. In the Stene case, the accused officer was charged with an unauthorized absence of twenty-six days' failure to obey an order and dishonorably failing to keep a promise to his commanding officer. He pleaded guilty to all of the specifications and was sentenced to be dismissed from the service. The convening authority affirmed the findings and sentence, but the board of review dismissed the specification alleging the failure to keep a promise as failing to state any offense. It affirmed the findings as to the other two allegations and found the sentence of dismissal to be an appropriate punishment for the affirmed findings. On rehearing, the board reaffirmed its prior conclusion as to the appropriateness of the sentence. Judge Latimer uses this language:

> "... A right to fit the punishment to the crime is thus vested in that agency, but no such power has been conferred on us. Here the board concluded that the sentence as imposed by the court-martial was legal and appropriate in all respects for the offenses which were affirmed. ..."

He then distinguishes the Voorhees case, supra, by saying:

> "While the cases may only differ in degree, they are so far apart factually that the dissimilarity calls for different results."

It may be worthy of note that at this point the Court, although saying that it does not have the power to fit the punishment to the crime, is certainly in a position of deciding whether the board has properly exercised the power vested in it. The only way by which such a determination could be made is to apply the punishment to the facts of the particular case, reach a conclusion as

to appropriateness and on the basis of that determination measure the results reached by the board. Actually, there is no objection to such procedure. It amounts to nothing more than a determination that, as a matter of law, the sentence, as approved by the board of review, is legal under the facts of the particular case. The function of weighing facts for legal sufficiency has previously been discussed. The same principles apply to a determination of the legality of sentence. It is suggested that a clear-cut recognition of these functions by the Court would greatly simplify their exercise.

Judge Latimer further said:

> "Over the five year period of this court's existence, we have repeatedly returned cases to boards of review for reassessment of sentence when a specification has been dismissed or the findings set aside by us. In addition, those agencies have long determined the appropriateness of sentences in the light of altered and modified findings. The power of a board to fix the quantum of punishment with or without affirming all findings is no longer in doubt. The principles controlling in that area have become so well fixed that little need be said concerning their place in our practice and procedure."

At this juncture, there can be no question but that boards of review do have the power to determine the appropriateness of sentences and the power to fix the quantum of punishment. Query is made, however, as to whether this is a power exclusively vested in the boards of review. Should this power not be limited in its practical application to sentences which remain after the findings have been altered or modified by the boards of review? It is without controversy that the sentence as approved by a board of

review after the findings have been altered or modified and found to be appropriate is still subject to review by the Court.

To carry through with the Court's reasoning, Judge Latimer will be quoted further, as follows:

> "..., at the risk of being redundant, we repeat that in military law, a single inclusive sentence is imposed, and unless a board of review has the power to affirm a sentence in whole or in part when findings are modified, the whole appellate superstructure must be redesigned. One of the cardinal principles set out in Article 66 of the Code is that a board of review may affirm all or part of the findings and determine a specially suited sentence from the entire record. That obviously means the record as it stands or as it has been changed by action on the findings. That must necessarily follow, for in some instances, the punishment imposed by the court-martial is assessed solely on the most serious aspect of the criminal transaction even though it may have been charged in several ways. In other situations, the total sentence may be determined by totaling the punishment considered appropriate for each crime. The record does not disclose the method used, but to make a workable system, some appellate agencies must have the power to adjust the sentence if the findings are changed on appeal. Congress has given boards of review the authority to determine the appropriateness of sentence, and surely within that grant of power would be the right to make the determination regardless of the action on the findings, in all cases where the sentence is one which the board is authorized to change. We believe the principle is expressed properly in United States v. Keith, 1 USCMA 442, 4 CMR 34. We there said:
>
> > "'... We quite agree that if a military judicial agency empowered to do so has determined that the original sentence is appropriate for a single valid conviction in a case involving several specifications, we are powerless to disturb that determination on review.'"

The Court then proceeded in the principle case to hold that the board of review had twice concluded as a matter of fact and of law that the sentence of dismissal was appropriate for the two remaining convictions. The crimes were serious, and the Court held that it could not say that they were not a major part both

quantitatively and qualitatively of the offenses considered by the court-martial. Such being the case, the board of review was held not to have abused its discretion in affirming the sentence. It is perfectly clear that if the board had abused its discretion in affirming the sentence, the Court would have had no qualms about taking remedial action. Had the approved findings of guilty represented but a small portion of the original findings, the Court would have returned the case to the court-martial for reassessment under the Voorhees case, supra. Granted that these situations were limited to cases wherein the only sentence was dismissal, did not the Court as a matter of law determine that a sentence of dismissal either was or was not appropriate under the facts of the particular case? The Chief Judge registered a strong dissent in the Stene case. He first dissented from the majority opinion's belief that the Keith case, supra, held that the Court could not review a sentence and quoted from United States v. Field,[162] wherein Judge Brosman noted that the Court had repeatedly emphasized that the Court held no warrant to determine the appropriateness of a court-martial's sentence although the Court had not denied the possession of power in a proper case to declare punitive action inappropriate as a matter of law. Secondly, he disagreed with everything in the principle opinion which either directly or by implication limited the power of a board of review to reduce a sentence of dismissal to a less severe form of punishment.

[162] United States v. Field (No. 2210), 5 USCMA 379, 382, 18 CMR 3.

At this point, reference will be made to Article 66(c) of the Code, supra, which has consistently been the foundation for all of the discussion regarding appropriateness. The Code provides that the board:

> "... shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved..."

There is nothing in that language which refers to appropriateness. Do not all appellate courts have power to reduce a sentence which is excessive as a matter of law? Is not a sentence which is excessive as a matter of fact also excessive as a matter of law? The boards of review have the power to weigh facts and in the light of those facts to determine what portion of the sentence is not, as a matter of law, excessive. Is not this exactly what Congress intended to give the Court of Military Appeals? Under Article 67 of the Code, the Court shall "take action only with respect to matters of law." An excessive sentence, as a matter of law, is illegal and requires remedial action. What prevents the Court from taking such action and itself approving only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved? The answer is nothing. The difficulty seems to arise from Article 67(e) which provides, as has been previously noted above:

> "If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting aside is based on

> lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing it shall order that the charges be dismissed."

There can be no question but what the charges must be dismissed in the event that the Court weighs the evidence in the record but finds it insufficient as a matter of law to support the findings. If there is sufficient evidence in the record to support the findings, there would be no reason to set aside the findings or the sentence and approval would follow. In the event there are several findings of guilty, the Court should set aside those which were not supported by sufficient evidence but would approve those which were supported. If it then approved the sentence or such part or amount as it found correct in law, there would be no need for a rehearing. It is only when the findings and the sentence are both set aside that a rehearing need be ordered or the charges be dismissed. If the board of review or the Court finds that prejudicial error has been committed by the trial court which is of such gravity, as a matter of law, that the finding cannot be sustained then the finding must be set aside. If the error goes to a substantial portion of the conviction, a rehearing may be ordered. If the prejudice was of a nature to blanket all of the guilty findings, a rehearing would certainly be in order. Under such circumstances, all of the findings of guilt would be set aside. It would follow that all of the sentence would also be set aside. Congress undoubtedly intended that such a case should be referred back to a trial court for

another trial. Wherein does this construction do any violence to the express provisions of the Code? It does not.

Bad Conduct Discharge.

Before leaving this area, one further situation will be presented. In United States v. Atkins,[163] the accused was convicted by a special court-martial of a violation of Article 92 of the Code and after considering three prior convictions the court sentenced him to be discharged from the naval service with a bad conduct discharge which both the convening and supervisory authorities approved. The board of review approved the findings but set aside the sentence. The Judge Advocate General of the Navy certified the following question to the Court:

> "Did the Board of Review err in that it affirmed the finding of guilty and yet disapproved and set aside the sentence in its entirety without ordering a rehearing?"

It is the Government's position, in line with previous cases discussed above, that such action goes beyond commutation and amounts to the grant of a quasi-pardon. It is suggested, in view of previous discussion, that the Court need only find that the board erred as a matter of law and order a rehearing or set aside the action of the board as to the sentence and approve that which the trial court imposed and which the convening and supervisory authorities approved. Again, why should the matter be referred back to the board of review? To carry the matter one step further, why should

[163] United States v. Atkins, NCM 56-02638 decided 13 September 1956 and presently before the Court of Military Appeals for certification.

the Court, if it should determine a bad conduct discharge to be excessive, be required to refer the case back? It is believed that there is considerable merit to the position which Chief Judge Quinn has consistently maintained in his dissenting opinions. To follow the consistency of this reasoning, there must be punishment less severe than death; so of dismissal or a punitive discharge. If the board of review should find one of these sentences excessive, why should it not have the power to approve any sentence of a less severe nature which was not excessive? Its actions would be reviewable by the Court. If the Court determined that the board was in error, it could then reinstate the original sentence. On the other hand, if a board approved an excessive sentence, the Court could approve only so much of that sentence or one less severe, as was not excessive.

In United States v. Brasher,[164] the Court held that the action on a sentence as approved by a board of review was illegal. The sentence as approved by the convening authority provided for a bad conduct discharge, forfeiture of $35.00 per month for ten months, and confinement at hard labor for ten months. The board of review set aside the discharge but affirmed the remainder. The Manual provides that a court shall not adjudge a sentence involving a forfeiture greater than two-thirds pay for six months or confinement for more than six months without including a dishonorable or

[164] United States v. Brasher (No. 499), 2 USCMA 50, 6 CMR 50.

bad conduct discharge. The majority of the Court held that the sentence as approved by the board exceeded that which a court could have imposed without punitive discharge and was therefore illegal. Judge Latimer dissented on the basis that the original sentence of the court-martial was legal and that he believed that Congress intended to confer upon boards of review the power to affirm any part thereof. This appears to be the position which the Chief Judge has taken by his dissents in more recent cases as noted above. It is also worth noting that the board of review in the Brasher case had two choices under the court's referral back for action, not inconsistent with the court's opinion. It could reduce the periods of forfeiture and confinement to six months, or it could determine that setting aside the punitive discharge constituted the illegality and thereupon approve the sentence as originally imposed. This is but another example of the rather anomalous situation into which the Court has been placed by its judicial interpretations limiting the powers granted by Congress to the boards of review and to the Court itself.

Suspension.

Another restriction upon the power of boards of review and upon the Court resulted also from judicial interpretation. In the case of United States v. Simmons,[165] the Court held that the power of suspension has been expressly granted to the President, the Secretary of the Department, and to the convening authority.

[165] United States v. Simmons (No. 940), 2 USCMA 105, 6 CMR 105.

Boards being purely creatures of statute, their powers and authority, like the court-martial itself, depend upon that granted by creating legislation. The Code did not grant express authority to suspend and, therefore, the court-martial, the boards of review, and the Court itself were without such power. The Court considered the historical background of suspension within the military establishment, noting that the power of suspension had been, without exception, vested solely in those reviewing authorities which had the power to order execution of a sentence. Boards of review from their statutory inception had never been granted this power. The Court concluded that if Congress had intended to alter this prior consistent policy it would have done so in express language. Instead, by Article 71 of the Uniform Code, it chose to place the power in the President, the Secretary of the Department, and the convening authority. The Court considered authority which seemed to support the proposition that there is an inherent power in courts to suspend a sentence. Citing the United States Supreme Court case of Ex parte United States,[166] the Court held that there was no inherent power, but:

> "Even if there existed this inherent power in courts of general jurisdiction, it would still be difficult to say that the same authority attached to a body such as a board of review."

The Court acknowledged the anomaly presented by a board's power to remit a punitive discharge yet be entirely powerless to suspend it under probation or a conditional guarantee of continued

[166] Ex parte United States, 242 U.S. 27.

good behavior. As indicated above, the author is not willing to concede that the Court of Military Appeals does not possess both the inherent power and statutory authority to suspend any sentence which a convening authority could suspend. The breadth of this discussion does not permit full development of this proposition at the present writing.

New Trial.

In giving consideration to what matters may be considered in the appellate process which are not included within the record of trial, the Petition for a New Trial must be noted. By express provision of the Code:[167]

> "At any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more, the accused may petition The Judge Advocate General for a new trial on grounds of newly discovered evidence or fraud on the court ...." (Emphasis added.)

The Manual[168] makes provision for implementing the above enactment of the Code. A mere glance at the emphasized wording of the Code provision discloses that the grounds contemplated will, by their very nature, be predicated to a large extent upon matter which is foreign to the record of trial. It was for this reason that the subject of new trials was deleted from detailed study. Furthermore, this procedure lies beyond the scope of appellate review. It is mentioned at this point for the sole purpose of preserving continuity of discourse.

[167] UCMJ, Art. 73.
[168] (par. 109-111, MCM, 1951).

CHAPTER V.

INSANITY--MATTERS OUTSIDE RECORD

BASIC PROVISIONS.

It is not the purpose of this discussion to encroach into the substantive law of insanity. Consideration will be limited to those aspects which are related to appellate review. In military law, insanity bears upon the mental responsibility of the accused at the time of the offense charged against him and also upon the mental capacity of the accused to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense.[169] To the latter may be added an extension which bears upon the mental capacity of the accused during the subsequent stages of appellate review. As a starting point, the Manual[170] will be consulted. It contains the following provisions:

> "After consideration of the record as a whole, if it appears to the convening authority or higher authority that a reasonable doubt exists as to the sanity of the accused, he should disapprove any findings of guilty of the charges and specifications affected by such doubt and take appropriate action with respect to the sentence. Such authority will take the action prescribed in 121 before taking action on the record whenever it appears from the record of trial or otherwise that further inquiry as to the mental condition of the accused is warranted in the interest of justice, regardless of whether any such question was raised at the trial or how it was determined if raised." (Emphasis added.)

[169] (par. 121, MCM, 1951).
[170] (par. 124, MCM, 1951).

The foregoing provision was undoubtedly the basis for the Rule that matters outside the record of trial will not be presented to or argued before a board of review except with respect to matters affecting the sanity of an accused tending to show that further inquiry as to his mental condition is warranted in the interest of justice.[171] The language of these provisions is very general and for that reason the decisions of the Court will be examined for the interpretations which the Court has placed upon them.

Raised by Unsworn Statement.

In an early case[172] arising before the Code, but reviewed after the effective date of the Code, it was held by the Court that unsworn testimony of an accused, given in mitigation did not raise an issue of sanity. The accused pleaded guilty to the charges against him but in mitigation entered an unsworn statement to the effect that he had been kicked in the head by a horse at the age of 14 and that since that date had suffered periodic blackouts with lapse of memory. The case was treated as though a not guilty plea had been entered. In addition to proof of the offenses charged, evidence was introduced to show the mental condition of the accused. A board of review disapproved the findings and sentence and ordered a rehearing on the ground that a question of sanity had been raised and that the accused was materially prejudiced by introduction of the health record of the accused. The Court reversed the board

[171] Rule IXF(3), Uniform Rules of Procedure for Proceedings in and Before Boards of Review, Appendix IV 1955, NS, MCM, 1951.
[172] United States v. Branstetter (No. 19), 1 USCMA 30, 1 CMR 30.

of review, holding that the trial court's action had been proper; that the presumption of sanity was unassailed and, therefore, error to introduce the health record to support the presumption; and that no material prejudice resulted.

Error for Board Not to Consider Post Trial Matter.

One of the next cases considered by the Court was the Burns case.[173] There the accused was tried and found guilty of assault with intent to commit murder. The issue of insanity was raised at the trial. The convening authority, after trial, ordered a further mental examination by a board of officers. The board believed the accused unable to adhere to the right. The convening authority, in spite of this finding, which was in agreement with undisputed medical testimony at the trial, approved the finding of guilt and reduced the sentence. Later, The Surgeon General of the Air Force reviewed the record but disagreed with the experts below and concluded that the accused was sane. The board of review approved the conviction and sentence but expressed the belief that it would not be proper for them to consider the opinions and reports submitted after the findings of the trial court. The case was submitted to the Court on certificate. It was held by the Court that the provisions of the Manual and Rule IX, supra, permitted the board to look outside the record of trial. If the issue has been fully litigated at the trial level, there is no requirement that the board upset the holding or launch into an independent

[173] United States v. Burns (No. 847), 2 USCMA 400, 9 CMR 30; affirmed 5 USCMA 707, 19 CMR 3.

investigation. However, there was no good reason to refuse to evaluate the evidence which had been produced. The board should have weighed the medical reports acquired after the trial along with the other evidence found in the record. The board of review ordered a rehearing at which the accused was again convicted. The Court later affirmed the conviction.

Rehearing Not Jeopardy.

Another aspect of the problem was presented by the Niolu case.[174] The day after the accused was convicted and sentenced by a general court-martial, an opinion was expressed to the convening authority, by the president of the court and others, that the accused was not mentally sound. No evidence bearing on sanity had been introduced at the trial, and no issue there raised. The convening authority disapproved the findings and sentence, directing a rehearing. At the rehearing, evidence regarding the sanity of the accused was presented to the court. The accused was again convicted. The convening authority approved, as did the Army board of review. The Court granted review as to whether the accused had been twice placed in jeopardy. It was held that there had been no evidence indicating insanity at the original trial and there were no indications that the members of the trial court could have entertained a reasonable doubt as to the sanity of the accused prior to their findings. The trial court therefore did not find the accused guilty in spite of doubts as to his sanity. Any

[174] United States v. Niolu (No. 1040), 2 USCMA 513, 10 CMR 11.

information concerning the matter was received by the court members after the trial had been concluded. The action taken by the convening authority was in accordance with paragraph 124 of the Manual, supra, and did not amount in law to an acquittal and, therefore, no jeopardy attached.

State Judgment Not Binding on Military.

The issue of insanity arose in United States v. Johnson.[175] Evidence of a Colorado lunacy proceeding was admitted in evidence without objection. The Court found that the Colorado judgment would not be binding upon a Colorado criminal court and that it was not, therefore, a judgment which obligated other courts to a conclusive finding of insanity to accord full faith and credit to the judgments of other courts. The Colorado proceeding determined the sanity of the accused as of the date the judgment was rendered. The Colorado judgment did not determine the ability of the accused to discern between right and wrong and to be able to adhere to the right. Although the Colorado judgment was a part of the trial record in the instant case, it is presented here as going to the weight which might be attached to such a judgment if first presented at the appellate level.

Examination Ordered by JAG.

In the case of United States v. Edwards,[176] the accused was convicted of premeditated murder and sentenced to death. Reviewing

[175] United States v. Johnson (No. 2588), 3 USCMA 725, 14 CMR 143.
[176] United States v. Edwards (No. 4355), 4 USCMA 299, 15 CMR 299.

authorities affirmed and the case was before the Court on mandatory review. Insanity had been considered by the trial court and under proper instruction the court had found the accused sane. Sometime after the trial, The Judge Advocate General of the Army requested that the accused be given an exhaustive physical examination. The examination resulted in finding the accused sane and that he had been sane at the time of the offense. The reported case does not recite whether the findings of the examination were available to the board of review but recital of its content by the Court makes it clear that it was available for their use. As a sidelight, this case was retained by the board of review after affirming the finding and sentence until inquiry could be made as to the mental condition of a member of the trial court. Psychiatric examination found him to have been sane at the time of the trial. The Court affirmed the finding and death sentence in this case.

Court Bound by Board's Findings of Fact.

The Court had before it the celebrated case of United States v. Dorothy K. Smith[177] which is presently under consideration in the United States Supreme Court. After the conviction of the accused for the premeditated murder of her husband, resulting in a sentence that she be imprisoned for life, the accused was observed by a civilian psychiatrist, a civilian clinical psychologist, and three military psychiatrists. Their findings were made available to the board of review. The Court held that the board had weighed this

[177] United States v. Smith (No. 3370), 5 USCMA 314, 17 CMR 314.

post trial evidence with evidence of record and found that premeditation existed. Judge Latimer, writing for the Court, p. 344, says:

> "Since this court lacks power to determine the weight of the evidence, even as to the issue of sanity, we are without authority to disturb the board's determination--regardless of whether we might have reached an opposite conclusion."

Court Authorized Mental Examination.

At about the same time that the Court decided the Smith case, supra, it was deciding the case of United States v. Kunak.[178] In that case, the accused was convicted of premeditated murder and sentenced to die. The facts were not in dispute. Briefly the accused was observed approaching the division mess tent carrying a carbine. He approached the table where the officers and civilians were seated, executed a right face, lifted the carbine so that the muzzle was about four or five inches from the victim's chest, and fired, with death resulting. After the shooting, the accused dropped the carbine to the ground and stood at parade rest. The defense relied solely upon insanity. When the case was being considered by the board of review, the members noted that at the trial, all of the testimony of the expert witnesses was to the effect that the accused was sane. Against this testimony they balanced the evidence of the accused's behavior, the presence of mental illness in his family, his actions prior to and immediately after the shooting. Pursuant to their Rule, they concluded to pursue the question of insanity further and referred the case to

[178] United States v. Kunak (No. 3787), 5 USCMA 346, 17 CMR 346.

The Surgeon General of the Army. He supported the finding of sanity. Reports were received from the Disciplinary Barracks regarding outbreaks of the accused there which expressed doubt as to his sanity. He was then sent to Fitzsimmons Army Hospital which reported him sane. The board of review thereupon affirmed the conviction and sentence. The case went to the Court of Military Appeals upon mandatory review. By stipulation, the review was suspended for further examination. Civilian examiners were of the opinion that the accused was insane. The case was returned to the board for redetermination of the issue of sanity. The board reaffirmed the findings and sentence. The Court considering the case for a second time reversed the findings and sentence on premeditated murder for instructional deficiency and returned the case for reconsideration. The board could affirm a finding of unpremeditated murder and affirm an appropriate sentence or reverse and return the case for rehearing.

Post Trial Insanity.

The case which will next be considered is that of United States v. Washington.[179] It is unique in that the members of the Court could not reach a decision as to the action to be taken. The Court was confronted with a problem of insanity which arose during the appellate process. The Court did, by majority, decide that insanity after findings and sentence does not stay the appellate processes. The Chief Judge concluded that the matter should proceed in the ordinary course. Judge Latimer reached a contrary result, expressing the belief that all proceedings should be stayed.

[179] United States v. Washington (No. 3451), 6 USCMA 114, 19 CMR 240.

Judge Brosman was of the opinion that the Court had the power to proceed with the appellate process, but he did not desire to do so and thought it within the discretion of the Court not to do so. Lacking a majority as to a single course of action, the case was returned to The Judge Advocate General of the Army without completion of appellate review.

The author Judge pointed out that the Court is not possessed of fact-finding authority whereas boards of review are so possessed. He pointed out further that a large amount of material had accumulated which might bear upon the mental condition of the accused at the time of the offense and at the time of the trial which had not been considered by a fact-finding tribunal of the judicial system. In support of this position, the author Judge quoted from the Burns case, supra, to the effect that if the issue of insanity had been fully litigated there was no requirement that the board of review upset the holding of the trial court and launch into an independent investigation. They believed, however, that there would be no good reason to refuse to evaluate evidence which had been procured. Evidence acquired after the trial should be weighed along with the other evidence found in the record.

Insanity Fully Litigated at Trial.

United States v. Bunting[180] was previously discussed under the powers and limitations of boards of review and of the Court.

[180] United States v. Bunting (No. 3387), 6 USCMA 170, 19 CMR 296.

It is again mentioned here only as affirming the holding in Burns and Washington, supra, to the effect that a board of review need not launch into an independent investigation if the issue of sanity was fully litigated at the trial level. In this case the record contained the testimony of eleven psychiatrists and psychologists and in the absence of some showing to the contrary, it should be concluded that the issue had been fully developed.

Post Trial Insanity--No Stay of Proceedings.

For the purposes of the present discussion, the case of United States v. Bell[181] presents a further extension of rules previously announced by the Court. Judge Brosman, writing for the Court, says:

> "Unlike this court, the several boards of review do possess authority to determine issues of fact and to act on the sentence. However, generally speaking, they are limited to the evidence presented in the record of trial, and are not permitted to supplement that document. Of course, there are instances where this limitation will not apply--and thus evidence bearing on the accused's possible lack of mental responsibility and capacity, or having to do with the court-martial's jurisdiction to try him may be weighed by the board, although not offered at the trial."

This case was another in which the question of sanity arose after the trial. The case was remanded for reconsideration by the board of review although Judge Latimer dissented and would have stayed the appellate proceedings. In response to the suggestion that counsel be appointed to carry on for the accused, he says:

> "Apparently the view is taken that a lawyer is a substitute for sanity, but I have grave doubts that that is a fair trade."

[181] United States v. Bell (No. 5316), 6 USCMA 392, 20 CMR 108.

This case does not make clear what appellate agency would make the determination as to the mental capacity of the accused if the stay theory were to be adopted.

Court Returned to Board for Inquiry.

The case of United States v. Dunnahoe[182] was decided after the death of Judge Brosman and prior to the appointment of Judge Ferguson. The accused was convicted of premeditated murder and sentenced to death. His victim was a thirteen-year-old German boy. The accused struck the boy several times, then without reason or excuse killed him by means of a pocket knife, mutilating the body badly. The abdomen was ripped open so that the intestines protruded. The genitals were cut off. Judge Latimer found that it was doubtful that the testimony of record reached the minimal limits necessary to raise an issue requiring instructions on the effect of a character disorder on the capacity of the accused to premeditate. The Judge had this to say:

> "There is evidence of premeditation which is ample to support the finding, such as accused's admission that he struck his victim several times because it would not increase the punishment he could expect for the first blow, and his statement that he had already stabbed the boy before he 'saw red.' Accordingly, Judge Quinn would affirm the conviction and sentence, and I would join him, if it were not for the fact that the death penalty was imposed .... I do not believe, however, that the issue need be returned to a trial forum, as, by directing a reconsideration by a board of review ... we are granting to the accused all, if not more, rights than he is legally entitled to receive. Judge Quinn is of the opinion that no issue was raised, but he is willing to give way in order to dispose of the case."

[182] United States v. Dunnahoe (No. 6740), 6 USCMA 745, 21 CMR 67.

The case was referred to a board of review which could affirm a finding of unpremeditated murder and such sentence as might be appropriate, less than death; it might order the accused examined as to his mental capacity to premeditate the offense, permitting the accused to furnish evidence on that issue and then reconsider the finding; or it might grant a rehearing. Chief Judge Quinn expressly disagreed with Judge Latimer's position that a board of review could cure an instructional error, committed at the trial level, by taking new testimony in regard to the issue. It is submitted that the result reached in this case amounts to mitigation of the death sentence or a relitigation of capacity to premeditate, either at board level or by rehearing. It is generally conceded that capacity to premeditate does not equate to insanity. It would appear, therefore, that there would be no legal basis for going outside the record of trial proceedings in this case.

Court Directed Further Inquiry.

The latest pronouncement within this area will be found in the case of United States v. Schick.[183] Judge Ferguson writes for the majority with Judge Latimer dissenting. The accused was convicted and sentenced to death for the premeditated murder of an eight-year-old girl. Evidence indicated that the accused had met the victim and talked with her for about ten minutes. She turned to leave whereupon the accused grabbed and choked her. He then gagged her with her "panties" and dragged her into a ditch where

[183] United States v. Schick (No. 6388), 7 USCMA 419, 22 CMR 209, previously before the Court and reported in 6 USCMA 493, 20 CMR 209.

he put his foot on her head so as to hold her face under the water. After the deed, he admitted experiencing a sexual release. The accused had been drinking from about noon until early evening prior to the offense. Insanity was the only issue at the trial. Two civilian Japanese psychiatrists had found the accused unable to distinguish right from wrong at the trial. Four Army psychiatrists were of the opinion that the accused was suffering from a non-psychotic behavior disorder but was able to distinguish right from wrong and to adhere to the right at the time of the offense and was able to understand the nature of the proceedings against him and to cooperate intelligently in his defense at the time of the trial.

After the appeal was assigned for argument before the Court, the defense moved to remand the case to the board of review, or in the alternative, for a continuance, for the purpose of obtaining examination by civilian psychiatrists. The continuance was granted with direction to report the findings to the Court. A team from the Menninger Clinic reported the accused unable to adhere to the right at the time of the offense and considered the accused permanently and incurably ill at the time of their examination. Other reports were also submitted indicating insanity at the time of the offense.

By unanimous decision, the Court held that once the accused has had a fair opportunity at the trial level to litigate the issue of his mental responsibility for an offense and his capacity to stand trial, those issues should on appeal be accorded the

same treatment as all other contested matters. The question should not be tried de novo at every appellate level. In view of what the Court considered to be unusual circumstances surrounding this case, it was returned to the board of review to evaluate all of the facts presented by the record, the report made to the Court and such other psychiatric evidence as the board might receive by its own investigation. The board of review again affirmed the findings and the sentence. The Court of Military Appeals affirmed the decision of the board of review.

It would appear, from the cases reviewed above, that there has been a tendency to throw open the doors for the consideration of new evidence, dehors the record, whenever and from wherever it originated, upon the mere mention of insanity. The more recent cases seem to sound some reluctance toward this approach. Why should the question of sanity be relitigated if a full and fair hearing has been accorded to the accused? Does lack of mental responsibility as a defense deserve any different consideration than such factual defenses as self-defense? The Code itself does not indicate that Congress had any such intent. The framers of the Manual, by paragraph 124, supra, have by the first sentence merely stated a general principle of appellate review. It is submitted that after a consideration of the record as a whole, any appellate body, including the convening authority of the court, should disapprove any finding of guilt to which a reasonable doubt exists regarding the sanity of the accused. This again is nothing

more than sufficiency of the evidence. If the evidence, as a matter of law, is insufficient to sustain the conviction, it should be set aside. If there are lower degrees of the offense charged, an appellate body may affirm only such degree of the offense as may be sustained by a sufficiency of the evidence. If the finding is set aside, then the sentence based upon that finding must also be set aside. The sentence may be reduced if the offense is reduced to a lesser degree of the one charged. If only part of the findings are set aside but others are affirmed then appropriate action with respect to the sentence would require that it be reduced in the proportion which those which were set aside might bear to the whole upon which the sentence had been adjudged. The Manual provides for the observation and report of a board of one or more medical officers with respect to the sanity of the accused whenever it appears from the record of trial or otherwise that further inquiry is warranted in the interests of justice whether raised at the trial and, if raised, regardless of its determination. The term "in the interests of justice" would appear to be the key words of the provision. They certainly connote nothing apart from every phase of the judicial process. It was certainly never the intention of the framers of the Manual to relitigate sanity every time the accused was examined. Most of the cases contain conflicting views expressed by experts. Witnesses express conflicting views in most criminal cases. Does the Manual express any intention other than a guarantee that every accused shall have

a full and fair hearing in the interests of justice? It is the belief of this writer that the cases presented show abuses to which the Manual provision has been subjected. In every instance, however, the abuse, though bordering flagrancy, has been designed to insure the most sacred rights of the accused. The Schick case, supra, gives rather conclusive support to the proposition that sanity, both as to responsibility for crime and capacity to stand trial therefor, will not be relitigated at each stage of the appellate process if a full and fair hearing has once been had.

Post Trial Insanity--Stays Review.

In concluding the discussion of cases in this area, it may be noted that Judge Ferguson has leaned away from the repeated position of the Chief Judge regarding insanity arising after trial. The Chief Judge has contended that the appellate process continue in spite of post trial insanity. Judge Latimer has been just as firm in his position that post trial insanity should stay appellate proceedings at whatever stage thereof the insanity may arise. In the case of United States v. Korzeniewski,[184] Judge Ferguson interpreted the position of the Chief Judge in the Washington case, supra, as permitting appellate review to continue before the Court even though the accused was insane because the court was limited in its review to matters of law which could not be affected by the condition of the accused. He interprets Judge Brosman's decision in the Bell case, supra, as holding that a board of review may complete its

[184] United States v. Korzeniewski, 7 USCMA 314, 22 CMR 104.

review even though the accused be insane. He then joins the position which Judge Latimer had maintained by his dissenting opinions, believing that insanity should stay appellate proceedings. The present case shows the Court in apparent agreement that a board of review, with its fact-finding powers, cannot proceed with the review of a case after the accused has become insane. Judge Quinn dissented in the case because he believed the interests of justice could be best served by a rehearing. His position has been so consistent in past cases that there would be no basis to believe that he now subscribes to the stay of proceedings belief. The case under consideration involved a charge of desertion. The accused had served credibly in combat during World War II, returning to the United States after the war. He was stationed near his home. He went home. At the time of his apprehension he had resided in his small home town as a respected citizen for about ten years. His insanity or breakdown came about after his trial and conviction. This case differs very materially from the peace-time atrocities of the sex slaying variety. The Chief Judge is not far wrong in his belief that the interests of justice may demand different treatment. He has shown no compunction toward sustaining death sentences in the former type case. His thinking is considerably embelished with compassion for possible mental impairment in the latter type. Judge Ferguson has not had the opportunity as yet to fully express his views. He has demonstrated a repugnance for the heinous with no sign of reluctance in sustaining death penalties.

Judge Latimer has supported the death penalty. His approach cannot be criticized as over-careful but may perhaps best be characterized as somewhat skeptical and exceedingly cautious. His aversions to the atrocious cause him to tread very lightly into those paths, exploratory of the minds of other men when illumined only by the faint and sometimes flickering lights of psychology and psychiatry. His aversions are somewhat relaxed toward the less severe penalty. The intermixture of judicial temperaments leads toward a nice balance which is as certain to prevent unjust punishment as the capabilities of mortal men will permit.

From a practical viewpoint, this writer favors the non-stay position of the Chief Judge. If a record of trial contains insufficient evidence to sustain a conviction, as a matter of law, but the accused becomes insane just after approval by the convening authority, what remedy is available for his benefit? The contentions on both sides of this issue are fully set forth in the cases. No one can say only one is right and the other is wrong either as a matter of principle or of logic. A firm position by the court on either side of this controversy will aid the practitioners in representing and processing those accused who are so unfortunate as to be afflicted.

CHAPTER VI.

JURISDICTION--MATTERS OUTSIDE RECORD

BASIC PROVISIONS.

As a prelude to this chapter, as in the preceding chapter on Insanity, no effort will be made toward an analysis of that broad field of law encompassed within the substantive law. This discussion will be limited to the appellate process and to what extent consideration may there be given to matters which are not within the record of trial. It was previously noted that the Code makes no provision which specifically authorizes any review except "on the basis of the entire record." The Manual did expand the scope of review "whenever it appears from the record of trial or otherwise that further inquiry as to the mental condition of the accused is warranted in the interest of justice." It has previously been shown that the Manual provision provided a basis for Rule IXF of the Uniform Rules, supra. Neither the Code nor the Manual provide any such exception as to matters touching upon Jurisdiction. In order to enable boards of review to reach fair and just results, The Judge Advocates General of the Armed Forces did see fit to include jurisdictional matters with Rule IXF of the Uniform Rules.[185] The pertinent part of this Rule will again be quoted for convenience, as follows:

[185] Rule IXF(2), Uniform Rules of Procedure for Proceedings in and Before Boards of Review, Appendix IV, 1955, MS, MCM, 1951.

"F. Matters outside record.--Matters outside the record of trial will not be presented to or argued before a board of review except with respect to: ...

"2. A question of jurisdiction."

TRANSCRIPT OF PRETRIAL CONFERENCE.

The first case in which the Court was squarely confronted with a problem in this area was in the case of United States v. Ferguson,[186] supra. It will be recalled that in this case the several accused were convicted of a mutiny at a post stockade. While the matter was pending before the board of review, after conviction below, a transcript of a conference attended by court members, the staff judge advocate, and the convening authority, the day before trial, was delivered to the board. The board considered the transcript as pertaining to jurisdiction. It was the opinion of the board that the pretrial conference reflected command control over the court-martial members; that the exercise of such control rendered the members incompetent to hear the case; that the court was without jurisdiction and the proceedings therefore null and void. They ordered a new trial before another court. Among other questions certified to the Court of Military Appeals by The Judge Advocate General of the Army was an inquiry as to whether jurisdictional error had been committed. The Court, with all members in agreement, were of the opinion that "command control" had been exercised but that the error was not jurisdictional.

[186] United States v. Ferguson (No. 3289), 5 USCMA 68, 17 CMR 68. See fn. 148.

A rehearing was ordered. Judge Latimer, standing alone, expressed the view that the transcript could be considered only on the question of jurisdiction. He would, therefore, have reversed the board's decision and returned the record to them for corrective action.[187] In reaching this conclusion, the Judge referred to the Manual, paragraph 8, which provides:

> "The jurisdiction of a court-martial--its power to try and determine a case--and hence the validity of each of its judgments, is conditioned upon these indispensable requisites: That the court was appointed by an official empowered to appoint it; that the membership of the court was in accordance with the law with respect to number and competency to sit on the court; and that the court was invested by act of Congress with power to try the person and the offense charged."

He next turned to an analysis of decisions of the Federal courts, believing that they extend jurisdiction beyond the express scope of the Manual provisions. After searching many of the Federal cases, he concluded that the Supreme Court has rejected any narrow concept of jurisdiction but will consider some infringements upon constitutional rights and privileges as being jurisdictional.[188]

[187] (par. 8, MCM, 1951).

[188] Opinion cites: Dynes v. Hoover, 61 U.S. 65; Shaw v. United States, 209 F.2d 811; Courts-martial not reviewable by Federal civilian courts. Habeas corpus lies if court-martial without jurisdiction, Snedeker, Habeas Corpus, 6 Vanderbilt L.Rev. 288 (1953); 15 ALR 2d 387; Ex parte Parrs, 93 U.S. 18; Ex parte Siebold, 100 U.S. 371; Ex parte Reed, 100 U.S. 13. Denial of constitutional rights, Johnson v. Zerbst, 304 U.S. 458; Shita v. Pescor, 322 U.S. 761; Hicks v. Hiatt, 64 F. Supp. 238; Anthony v. Hunter, 71 F. Supp. 823; Henry v. Hodges, 76 F. Supp. 968; Humphrey v. Smith, 336 U.S. 695; Hiatt v. Brown, 175 F.2d 273, and 339 U.S. 103; United States v. Hiatt, 141 F.2d 664; Burns v. Wilson, 346 U.S. 137.

Accepting a broader meaning of jurisdiction than is indicated by the Manual, supra, the Judge was of the opinion that the facts did not bring the case within any of the deprivations providing a foundation for habeas corpus in Federal cases. He further reasoned that adequate appellate proceedings were available to the accused to correct any error committed at the trial level.

Chief Judge Quinn agreed that the exercise of command control did not deprive the court-martial of jurisdiction but would not limit consideration of the transcript to jurisdiction only. He reasoned that the rule which prevents a consideration of matters on appeal which were not raised at the trial level can have no application when the reasons for the rule are not present. An exception to the rule arises regarding "questions of a general public nature affecting the interests of the state at large." He considered command control to "gravely affect the military community." Although the Chief Judge does not say so in so many words, he might just as well have said that matters outside the record may be considered whenever necessary in the interests of justice. This is not far from the authority reserved by The Judge Advocate General to request boards of review to report on "any matter outside the record in mitigation of the sentence or otherwise in the interest of justice."[189] His approach is practical and quite realistic. It is not out of keeping with the results which he reached in related cases dealing with insanity discussed above.

[189] Rule IXF(4), Uniform Rules of Procedure for Proceedings in and Before Boards of Review, Appendix IV, 1955, NS, MCM, 1951.

Judge Brosman, by separate opinion, expresses doubt that the meaning of jurisdiction should be tested by the narrow constructions considered in habeas corpus proceedings. He then discusses other approaches which might reach the same result but agreed with the Chief Judge that the board could have considered the transcript and that once command control was shown a rehearing was required.

PRETRIAL INSTRUCTIONS.

Shortly after its decision in the Ferguson case, supra, the Court had before it United States v. Haimson.[190] Among other issues raised on appeal, it was contended that the instructions issued by the convening authority to the trial counsel by indorsement constituted an alignment with the prosecution sufficient to make the convening authority an accuser. In an attempt to ascertain the extent of the convening authority's interest in the case, appellate government counsel took sworn statements from an assistant staff judge advocate. Appellate defense counsel obtained cross-interrogatories. The statement thus obtained was attached to the Government's brief which the board of review held might properly be considered as relating to a jurisdictional question. The Court found no command control of a nature to disqualify the convening authority. By affirming the decision of the board of review, the Court found nothing amiss in the board's consideration of the sworn statements submitted to them. The Court very carefully reviewed these same statements in reaching their own opinion.

[190] United States v. Haimson (No. 4549), 5 USCMA 208, 17 CMR 208.

POST TRIAL INFORMATION--RIGHT TO REBUT.

Another case is that of United States v. Long.[191] In that case, the accused stood convicted upon his plea of guilty. A sentence of bad conduct discharge, forfeiture and confinement had been imposed. Appellate review left the sentence unchanged. The accused was represented before the special court-martial by an enlisted man who served as his appointed defense counsel. It was contended before the board of review that such appointment deprived the court-martial of jurisdiction. The board took cognizance of Rule IXF2, supra. It concluded that the court-martial was not divested of jurisdiction but then noticed a letter addressed to The Judge Advocate General of the Navy wherein, over the reputed signature of the accused, he stated that he had enlisted counsel at his own request. The Court permitted the Government and defense counsel to file affidavits bearing on this point. The Court held, without regard to the affidavits, that the record failed to disclose the appointment of any qualified defense counsel and showed no waiver of his rights to the benefits and assistance of an officer consultant. Having been denied a substantial right, though not jurisdictional error, the accused had just cause for complaint. The findings and sentence were reversed, and a rehearing was ordered. The majority opinion points out:

> "... in view of our disposition of this case, we do not enter the battle concerning these subsequent affidavits except to point out that they would have been unnecessary had

[191] United States v. Long (No. 5503), 5 USCMA 572, 18 CMR 196.

> the board of review proceeded in an orderly manner. If an appellate agency is going to use any post-trial information as a basis for its decision, on jurisdictional matters or in any other permissible areas, each party should be afforded an opportunity to present his, or its side of the dispute. Here, before basing an affirmance on a post-trial admission of the accused, he should have been accorded the right to make any explanation, denial, or avoidance which was available to him. At the least, he was entitled to be confronted with the testimony and meet the issue it posed if the evidence was to support, in whole or in part, the decision of the board of review. Obviously this case illustrates the necessity for a full and fair hearing on facts which may be used for the purpose of resolving a dispute. Presently the parties are attempting to litigate the controversy at this level, and we are not inclined to become a trial forum."

Judge Quinn dissented. He found no evidence to support the conclusion that the accused was prejudiced by the appointment of an enlisted person as his counsel and would have affirmed the decision of the board of review. He voices no objection to the dicta quoted above. There can be little objection to its tenets and, for all practical purposes, it is believed that its expression may well be considered to be a well placed qualification to any use of matter outside the record of trial.

In a case which has been previously discussed, United States v. Bell,[192] supra, the Court considered the post trial insanity of the accused. The Court does express the general principle that evidence bearing on the accused's possible lack of mental responsibility and capacity, or having to do with the court-martial's jurisdiction to try him, may be weighed by boards of review, although not offered at the trial. Unlike the Court, the boards of

[192] United States v. Bell (No. 5316), 6 USCMA 392, 20 CMR 108.

review do possess authority to determine issues of fact and to act on the sentence. Generally the boards are limited to the evidence presented in the record of trial and are not permitted to supplement that document. This case offers little as to jurisdictional matters but will be found helpful as a neat summary.

IN THE INTEREST OF JUSTICE.

The next case submitted for consideration is that of United States v. Dickenson.[193] The accused was captured by Chinese Communist forces in 1950. After the armistice, he refused to return to the United Nations forces but later changed his mind. He was charged with unauthorized communication, correspondence, and holding intercourse with the enemy while a prisoner of war and with having informed on other prisoners in order to secure favorable treatment for himself. The conviction, with a sentence to a dishonorable discharge, total forfeitures, and confinement at hard labor for ten years, was presented to the Court of Military Appeals upon the accused's petition for review. Although this case does not fall specifically within that category of cases wherein matter beyond the record was considered on appeal as going to jurisdiction, its proximity to those cases warrants its mention here. The accused challenged the sufficiency of evidence under the informing charge. He argued that the evidence would support the same charge leveled at innumerable other persons. In support of his position, a motion was made to the Court to consider the testimony of a certain witness

[193] United States v. Dickenson (No. 6238), 6 USCMA 438, 20 CMR 154.

who testified in a wholly separate trial of another accused. The Court was not disposed to take judicial notice of specific testimony in another case. The opinion, p. 457, says:

> "In any event the new evidence presented by the accused can be considered only for the purpose of determining whether justice requires that he be granted a rehearing on the disputed allegation."

The Court did in fact look at the testimony given by the witness in the other cases. In affirming the conviction, the Court denied the motion of the accused for consideration by the Court of the testimony given in the other case in connection with its review. A unanimous Court was actually giving effect to the same interest of justice to which Chief Judge Quinn hitched his decision in the Ferguson case, supra. In the Ferguson case, p. 70, Judge Latimer said:

> "Either boards of review and this court should be guided by rules which should be observed, or the system becomes one of men and not one of laws. If that happens, the record on appeal becomes as variant as the idiosyncracies of the individual judges."

In this connection, Judge Brosman, at p. 87 of the Ferguson opinion, said:

> "It has been suggested informally that this court is one of substantial justice and not of law. I have no means of knowing whether the comment was intended as a compliment or the reverse. For myself, however, I have never believed that there exists a necessary dichotomy between law and justice--measured in its broadest aspect. And if there does, then in my book so much the worse for the law. And if administering law requires that I think after the manner of the eighteenth century, then I am clearly administering something else. No longer, I believe, may a misplaced comma mean on occasion the loss of a man's life or his fortune. Here I am sure that I am administering justice and at the same time law--a solemn expression of legislative will."

It will be recalled that he was there convinced that the board of review could have considered the transcript of the pretrial conference apart from any question of jurisdiction, however narrowly or broadly that term might be interpreted.

DELEGATION OF POWER--VOID.

One case has arisen in this field since Judge Ferguson joined the Court. He wrote the opinion for a unanimous Court in the case of United States v. Roberts.[194] The case is actually not particularly helpful. After the board of review had acted, the convening authority submitted a letter. Affidavits containing much the same information were attached to the pleadings. The Court considered the material submitted and reached the conclusion therefrom that the case had not been referred for trial by the convening authority. The decision of the board of review was reversed and the findings of guilty and the sentence were set aside. The record was returned for a rehearing. The Court considered that their action eliminated action on a petition for a new trial. If the delegation of authority rendered the action of referral void, it was a jurisdictional defect. Under such circumstances, it would appear that another trial would have been necessary. A rehearing would limit the maximum punishment to which the accused might be subjected whereas there would be no such limitation attached to another trial. From a practical standpoint, the accused in this case was probably entitled to any benefit which might arise from this decision and

[194] United States v. Roberts (No. 7738), 7 USCMA 322, 22 CMR 112.

it is probably not too important that the Court should choose one course over another.

In general, the rules seem to be rather well defined in this area. The broad considerations as to what defects are jurisdictional will continue to be troublesome. If one were to hazard a speculation as to future trends, however, it is quite possible that the Court will consider matters outside the record of trial whenever the interests of justice require such action.

CHAPTER VII.

JUDICIAL NOTICE

GENERAL.

The subject of judicial notice may not lie within the purview of the present discussion. Matter which may be judicially noticed, however, is rather a hybrid type of evidence. It is an intermixture of matter, within the record, originating outside of the record and brought into the record to make it complete. Normally judicial notice is dealt with at the trial level as a short-cut method of presenting proof or as a substitute for other forms of evidence. Its application is not restricted to the trial forums; it also has use at the appellate level. No attempt will be made herein to treat this matter in its entirety. Only a few cases dealing with this phase of the appellate procedure have been before the Court of Military Appeals. This discussion will be limited to those cases. Paragraph 147, Manual for Courts-Martial, 1951, provides the foundation for this type of evidence.

RECORDS OF OTHER CASES.

In the rather early case of United States v. Jackson,[195] the accused was convicted of an unauthorized absence from January 1, 1951, to March 7, 1951, while in Korea. No prior convictions were proved at the trial. Attached to the allied papers was an extract copy of the accused's service record which disclosed

[195] United States v. Jackson (No. 141), 1 USCMA 190, 2 CMR 96.

that the accused was tried and convicted by an Army summary court-martial in Korea on January 15, 1951, at considerable distance from his own unit, for which he received a sentence forfeiting $50.00 of his pay. He was tried under his correct name, service number, and organization. The question presented was whether a temporary exercise of jurisdiction terminated the longer absence charged in the case under review. The Government objected to consideration of the record since it was not introduced in evidence nor adverted to at the trial. A unanimous Court noted that there was authority both military and civilian for taking judicial notice of the record of trial in another court-martial. The Court, without deciding the issue, assumed that the record of the summary court-martial was before it and determined that had the accused disclosed his status as an absentee to military authority, his absence would have terminated but did not do so under the circumstances. In reaching its conclusion, the Court referred to conditions in Korea and the practice there of establishing summary courts-martial where there were large concentrations of troops to prosecute minor offenders without returning them to their regular units for disciplinary action. No mention is made as to the source of this information. It appears doubtful, however, that it was any more a part of the record of trial than was the service record extract. The Court may have been taking judicial notice of conditions in Korea although it would be rank speculation to make such an assertion.

The case of United States v. Dickenson[196] has been discussed above. Here, Chief Judge Quinn, in writing for a unanimous Court, expressed the view that the Court took judicial notice that many prisoners were subjected to severe brutality or to tremendous psychological pressures which made them do and say things which they would otherwise have avoided. In this connection, the Court also considered a publication by the British Ministry of Defence, reporting similar treatment of British prisoners by the Chinese.

The Court was asked to take judicial notice of specific testimony contained in the record of another separate case. Strangely, the opinion states that the court was not disposed to so do, yet the court did look at the specific testimony contained in the other case to determine whether justice required a rehearing but concluded that such action was not necessary. The motion that such testimony be judicially noticed was denied.

A middle position case is that of United States v. Stringer.[197] In this case, four enlisted men of the Navy were charged with conspiracy to sell military property and the larceny of military property. They were convicted at separate trials. A timely objection in the principal case raised a question regarding the qualification of the assistant trial counsel to serve because of his prior participation in the matter. It was contended that he had served as defense counsel for another participant who was

196 United States v. Dickenson (No. 6238), 6 USCMA 438, 20 CMR 154.
197 United States v. Stringer (No. 3033), 4 USCMA 494, 16 CMR 68.

granted immunity from further prosecution and who testified in the present case. The Court granted limited review in the other three cases. All were heard together. Here, very clearly, all four records were before the Court. The Government contended that the Court improperly took judicial notice of records which were not before it. In sustaining the convictions, the Court merely brushed aside this issue saying that the manner in which the cases were set for hearing together obviated extended discussion of the point. The Government had certainly taken an anomalous position in trying to sustain a conviction. From a practical standpoint, the Court's solution cannot be subjected to serious criticism. The action taken is not wholly in accord with the expressed decision in the Dickenson case, supra. In Jackson, supra, the Court did not decide the issue of judicial notice but indicated there was ample authority for doing so. After looking at the other cases in all three situations presented, the Court has only indicated that the records of other cases may not be the proper subject of judicial notice in all circumstances.

COMMON KNOWLEDGE.

There can be little doubt that the Court recognized conditions existing in Korea and the disciplinary system which was being used there. The Court expressly took judicial notice of the treatment of prisoners by the Chinese. An examination of other cases may prove helpful.

Along a similar vein is the case of United States v. Cook.[198] The accused stood convicted by general court-martial in Korea, of desertion with intent to avoid hazardous duty. The evidence disclosed that the accused was ordered to report to the machine gun platoon of "D" Company for medical aid duty. The company was then in reserve but some thirty-six hours later entered combat and suffered heavy casualties. Defense urged that there was insufficient evidence to establish that the accused knew with reasonable certainty that he would be required for such hazardous duty. The Court took judicial notice that it was a matter of common knowledge within the Army that medical men are always attached to units such as machine gun platoons when those units are going into combat. It was held that such knowledge was reasonably imputable to the accused.

At about this same period, the case of United States v. Jones[199] was heard. This case treated matters of common knowledge in a different manner. In this case, the accused was charged with the wrongful introduction of marihuana into station. Evidence referred to the Augsburg Autobahn Snack Bar. At the outset of the trial, the law officer had questioned the "into station" allegation but defense counsel not only failed to demand proof of its location but admitted its character as part of a military post in the American zone of occupation. As to the objection on appeal that

198 United States v. Cook (No. 1121), 2 USCMA 223, 8 CMR 23.
199 United States v. Jones (No. 288), 2 USCMA 80, 6 CMR 80.

the record contained no proof that the snack bar was a military station, the Court held that the trial court could have taken judicial notice of the snack bar's character but noted that there was no notation in the record, as required by proper procedure, that such action was taken. The Court then went ahead to note a doctrine, analogous to judicial notice, whereby the trial court might resort to the common fund of experience and knowledge which men generally have obtained through data notoriously accepted by all. Applying this doctrine to military trials, the Court said:

> "It is indeed enough if it be notorious to military men--and particularly to those in the area involved."

The Court found no error in the trial court's evident conclusion that the snack barwas a military station.

Following was the case of United States v. Weiman.[200] It presented a question regarding court-martial jurisdiction over Polish nationals and retainers to the camp of the United States troops in France. The Court, citing Jones, supra, held that they would recognize the existence of facts which did not appear in the record of trial but which were matters of common knowledge to military personnel at the scene of the court-martial. They recited that official records of the Department of the Army disclosed the recruitment of a certain Labor Service Company which was taken to France for service with United States forces there. The Court, although not mentioning judicial notice, recite that they had

[200] United States v. Weiman (No. 1403), 3 USCMA 216, 11 CMR 216.

examined the treaty and agreements existing between the United States and France respecting the presence of American forces in that country. Since they were classified, their contents were not set out in the opinion, nor were they a part of the record. The Court did not elaborate on whether this was judicial notice or the analogous doctrine mentioned in Jones, supra. There is no indication that the trial court had followed the Manual procedure requiring a notation in the record of trial. It is possible that the Court has tended to expand the basis of their concept regarding judicial notice. There does not seem to be any particular reason to distinguish matters of common knowledge. It may be just as reasonable to recognize that the trial court has in fact taken judicial knowledge of certain facts without announcing of record that it had done so. The Court of Military Appeals does not seem bound to make an announcement in every instance.

The case of United States v. Jester[201] arose on a rehearing. At the original trial, the prosecution depended upon one witness. At the rehearing, the evidence which had been given by this sole witness at the first hearing was admitted in evidence over defense objection. The accused later gave testimony amounting to a judicial confession. The initial trial was held in Korea whereas the rehearing took place in California. The Government argued that once the residence of the witness was established in Korea, it was presumed to continue. The Court took judicial notice, as a matter

[201] United States v. Jester (No. 1655), 4 USCMA 660, 16 CMR 234.

of common knowledge, that the United States Army maintained a large scale rotation program in Korea with the average tour of duty there varying at different periods. In reaching the conclusion that the former testimony was inadmissible, the Court held that there was little practical likelihood that the witness had remained in Korea indefinitely. The burden was, therefore, upon the Government to show a proper foundation for the admission of the prior testimony which was not done.

The Court of Military Appeals took judicial notice that at the time of petitioner's induction, Mexico was in point of fact in a state of war with Germany, Italy, and Japan, thereby making the accused a citizen of a cobelligerent and not of a neutral nation. On trial for desertion, the accused contended that the court-martial lacked jurisdiction to try him. He based his position on the theory that he was a citizen of Mexico, a neutral foreign state, and therefore had never been lawfully inducted into the service of the United States.[202]

Judicial notice was taken by the Court that telephone extensions were in general use in 1934 when Congress passed the Federal Communications Act. The majority found that a person who uses the telephone as a means of communication impliedly consents to the receiver's use of existing extensions and that Congress did not intend to prohibit such use. They concluded that a person who overhears a telephone conversation by means of an extension instrument,

[202] United States v. Rodriguez (No. 365), 2 USCMA 101, 6 CMR 101.

which he is authorized to use by one of the parties to a conversation, may testify to its contents, even though the other communicant did not know of, or consent to, the listening in. Judge Latimer dissented as to the ultimate result of the case.[203]

The Court recognized with approval that the trial court had judicially noticed Army regulations requiring that each person named in transfer orders must be provided with a copy thereof. The regulations were contained in Department of the Army Technical Manual 12-250. The Court quoted from paragraph 147a of the Manual for Courts-Martial, 1951, providing that judicial notice may be taken of the regulations and official publications of the Department of Defense and departments thereunder. The accused was charged with desertion with intent to shirk important service. Evidence was introduced to show the issuance of orders to the accused and judicial notice was used to show that the accused had knowledge of the assignment.[204]

REFUSED.

In reversing the conviction of the accused, the Court held that it could not look to the local law of a state for matters subject to judicial notice or the presumption of genuineness of the signature of a state official. They reasoned that different states have different statutes whereby different results would obtain on similar facts when tried by courts-martial if guided by

[203] United States v. DeLeon (No. 5234), 5 USCMA 747, 19 CMR 43.
[204] United States v. Taylor (No. 1454), 2 USCMA 389, 9 CMR 19.

such local statutes. The case involved the larceny of a check and the forgery of the payee's name. A photostatic copy of a check issued by the Commonwealth of Pennsylvania upon the World War II Veteran's Compensation Fund was the foundation for the prosecution's case. There could be little controversy over the result reached by the Court in this case.[205]

The Court also refused to take judicial notice in the case of United States v. Parker.[206] In this case, the accused stood convicted of two offenses of rape and one assault with intent to commit rape. A death sentence had been imposed. The record of trial indicated that the defense counsel had not been appointed more than one day prior to trial. The Court was requested to take judicial notice that counsel are often quite active in a case before the appointing order is issued. This the Court refused to do because there was no showing as to any standard practice in that regard and the record did not indicate any extensive preparation for trial. Chief Judge Quinn did not argue with this particular finding but, as might well have been expected, dissented upon other grounds. He would have denied the petition for a new trial and affirmed the decision of the board of review. The case involved what the opinion characterized as three heinous offenses. It is not particularly in point as to the matter under discussion, but lends further credence to past discussion to here note that the Chief Judge in concluding his dissent said:

[205] United States v. Bryson (No. 2032), 3 USCMA 330, 12 CMR 86.
[206] United States v. Parker (No. 5759), 6 USCMA 75, 19 CMR 201.

"I have a feeling that the majority is disturbed by the death sentence. They would like to have it reduced, but they are unable to accomplish that purpose short of a rehearing. ... I have no difficulty .... If the majority voted to return the case to the board of review for reconsideration of an appropriate sentence, I would join them. On the record, however, I cannot concur in ordering a rehearing."

MILITARY MATTERS.

In the case of United States v. Williams,[207] a question regarding the devolution of command with power to refer charges for trial was presented. A majority of the Court took judicial notice that certain officers held certain official positions within a given theatre. Chief Judge Quinn, although concurring in the result reached by the majority, did not agree that judicial notice could be taken of the fact that two officers of specific grade were present in a designated area and that one was senior to the other. He further expressed serious doubt that the Court should take judicial notice of a Department of the Army special order as distinguished from a general order. The majority had considered a special order together with a general order and affidavits wholly outside the record.

The case of United States v. DeMaria[208] presented a matter theoretically similar to Williams, supra. The accused was convicted of engaging in transactions involving an attempt to exchange outdated military payments for certificates of a new series. Army regulations prohibited certain certificate transactions, also

[207] United States v. Williams (No. 6371), 6 USCMA 243, 19 CMR 369.
[208] United States v. DeMaria (No. 6555), 6 USCMA 585, 20 CMR 301.

the acceptance or exchange of certificates after a date to be designated by the Secretary of the Army. Other directives and messages implemented the procedures to be followed. The court-martial took judicial notice that the Secretary of the Army had designated a certain date in accordance with the prearranged plan. The defense requested details of the arrangement be also noted but none were offered in evidence. On appeal, the Court was urged to judicially notice the conversion procedures prescribed by the Secretary. The Court considered them in detail and reversed the conviction for the reason that the accused was not charged with a prohibited act. The Chief Judge, in writing the principal opinion, expressed doubt that certain messages, addressed to designated commanders, were properly subject to judicial notice without evidence of their further and general dissemination. Judge Brosman did not think any such limitation existed. Judge Latimer reasoned that the trial court had judicially noticed the only relevant items and found that there was sufficient evidence to sustain the conviction, thereby dissenting from the majority, not in the application of judicial notice, but by a different interpretation of the prohibitory language of the regulations.

This case is not particularly helpful although it offers support to the proposition that the court will not be narrowly fettered in its efforts to protect the rights of an accused to the end that he be assured a fair trial. The last two cases also show the Chief Judge leaning toward the common knowledge

doctrine. General orders qualify whereas special orders or directives of limited circulation may need a foundation before their admissibility would be warranted.

Technical Manuals.

Judicial notice of Technical Manuals has been considered well within the provisions of paragraph 147a, Manual for Courts-Martial, 1951. The treatment which has been given to one Technical Manual, TM 8-240, Psychiatry in Military Law, however, makes it worthwhile to give particular attention to the cases which have dealt with this problem.

In United States v. Smith,[209] supra, the issue of insanity was injected into the trial of the accused, charged with the premeditated murder of her husband. TM 8-240 was utilized in the cross-examination of a defense witness and in the direct examination of prosecution witnesses. The Court found that this Technical Manual, jointly published by the Army and the Air Force, clearly fell within the Manual description of those matters which may be judicially noticed. The Court reasoned that if this matter might properly have been noticed judicially by the court-martial it might just as properly be used in connection with the examination of witnesses. It was held that the portions used correctly stated the law. The Court also noted that a mere doubt as to the use of the TM expressed by defense counsel was not an objection to its use.

[209] United States v. Smith (No. 3370), 5 USCMA 314, 17 CMR 314.

Chief Judge Quinn registered a strong dissent on the basis that the prosecution's expert witnesses did not testify as to their opinions based upon their own knowledge and medical experience but in accordance with the structures of the Technical Manual. He expresses the belief that these witnesses considered themselves bound by the Technical Manual's terms to the exclusion of their own individual professional opinions. He incorporates by reference his dissent in the Kunak case, infra.

In the case of United States v. Kunak[210] which was decided on the same day as the Smith case, supra, the Court had before it a premeditated murder case defended upon insanity. A majority of the Court thought that no error was committed in the trial court by taking judicial notice of TM 8-240. The Chief Judge again dissented, asserting that the apparent purpose of the Manual's provisions, regarding judicial notice, was to obviate proof of facts, which, in general, are notoriously known in the military establishment. He expresses the belief that it is a perversion of that purpose to use it as authority for taking judicial notice of individual beliefs and opinions. Recognized texts and treatises may be used to test the qualifications of experts, but their content has no independent probative value. The Chief Judge was further of the opinion that the Manual for Courts-Martial expressly makes the doctrine of irresistible impulse a part of the military law whereas the Technical Manual virtually eliminates it. Thus he challenges whether TM 8-240 does correctly state the law.

[210] United States v. Kunak (No. 3787), 5 USCMA 346, 17 CMR 346.

The positions of the jurists shift in the case of United States v. Schick.[211] Judge Ferguson is author of the majority opinion in which the Chief Judge concurs. This was a prosecution for the alleged premeditated murder of an eight-year-old girl at Tokyo, Japan. The accused was convicted and sentenced to death. Judge Latimer became the dissenting Judge. Without considering other aspects of this case at this time, and looking only to the treatment accorded to the Technical Manual, the author Judge is quoted:

> "The accused also argues that he was prejudiced because use of the Department of the Army Technical Manual, TM 8-240, Psychiatry in Military Law, by the court-martial and board of review, precluded their exercise of independent judgment. In this connection we announce that at most the 'Tech Manual' occupies the position of a text book or treatise on the subject of insanity. (See opinion of Chief Judge Quinn, United States v. Kunak ...). It is not competent evidence of either the facts or opinions advanced by the authorities. It may be used to a limited extent in connection with the testimony of an expert witness, but it does not have any independent probative value. A study of the record in this case now before us makes it abundantly clear that all the psychiatrists who testified at the trial arrived at their respective conclusions from an independent evaluation of many factors taken from numerous sources and the witnesses appeared to be completely unfettered by the 'Tech Manual.' As a matter of fact, there is no mention of this Manual throughout the trial. All of the psychiatric testimony for the Government was to the effect--without equivocation--that the accused knew what he was doing at all times, could distinguish right from wrong and adhere to the right as to the offense charged. And at no place in the law officer's instruction did he advert to the 'Tech Manual' or call the court's attention thereto."

The Court's finding that there was no mention of TM 8-240 offers little clue as to why the defense claimed prejudice by its use at the trial level and by the board of review. It can undoubtedly

[211] United States v. Schick (No. 6388), 7 USCMA 419, 22 CMR 209.

be concluded, however, that the opinions expressed by Chief Judge Quinn as dissents in the Smith and Kunak cases, supra, have found favor with Judge Ferguson. Accordingly, judicial notice of official publications will probably be limited to those publications containing matters of common knowledge.

From the cases which have been presented, no particular pattern or trends are discernable. From the scarcity of cases, judicial notice does not appear to have been widely used in courts-martial trials. It does provide an expeditious means of presenting facts to the trial courts and its wider use should certainly be encouraged. There can be little doubt that boards of review have nearly full reign with its use as evidenced by its use before the Court. Certainly the fact-finding bodies, including the convening authority, can always seek out truth and fact. There is considerable material available in this field.[212] Each particular use will require research beyond military authority and still kept within the use authorized by the Manual.

[212] For comprehensive coverage, see: Wigmore on Evidence (3d ed.), Vol. IX, Sects. 2565-2583; Morgan, Judicial Notice, 57 Harv. L. Rev. 269 (1944); Davis, Official Notice, 62 Harv. L. Rev. 537 (1949); Keefe, Landis, and Shaad, Sense and Nonsense About Judicial Notice, 2 Stanford L. Rev. 664 (1950); Comment--Evidence, Judicial Notice by Appellate Courts of Facts and Foreign Laws Not Brought to the Attention of the Trial Court, 42 Mich. L. Rev. 509; McCormick, The Need for and the Effect of Judicial Notice, 5 Vanderbilt L. Rev. 296 (1952).

CHAPTER VIII.

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Very little purpose can be served by attempting to recapitulate in detail the holdings of the many cases which have previously been discussed herein. Only a rather broad and general summary will, therefore, be presented and that only to serve as a foundation for certain conclusions which have been drawn. From these conclusions, some recommendations will follow which it is hoped may serve some useful purpose.

SUMMARY.

The Convening Authority.

It was noted that the convening authority and the supervisory authority can be considered as nearly synonymous in so far as their functions of review are concerned.

The review of a finding of not guilty is limited to jurisdiction and sanity.

The authority to approve guilty findings and sentences is conditioned upon the evidence of record and the law of the case, whereas authority to disapprove is conditioned only upon discretion. The mandatory death sentence provides an exception. The convening authority may consult "Joe" or anyone else and may consider information from any source he chooses as a basis for the disapproval of a finding of guilt or some portion of a sentence.

The approval of a finding of guilt necessitates that the review be limited to the content of the record of trial. In determining jurisdiction and the sanity of the accused, matters outside the record may be consulted. No error is committed if jurisdiction is substantiated or if additional proof corroborates the sanity of the accused by this search. No additional proof of guilt will be tolerated, however, from sources lying beyond the record.

There are further limitations placed upon approval. It must have the support of the independent judgment of the staff judge advocate or legal officer. Failing such support, the opinion of The Judge Advocate General of the appropriate service must be sought.

Erroneous advice to the convening authority must be corrected whether affecting the finding or the sentence.

A convening authority and his staff judge advocate or legal officer must in fact be impartial. An accused, of course, is not limited to the record of trial in showing the partiality of either. A convening authority who has become an accuser, a witness against the accused, or has any personal interest in the outcome of a trial, is not impartial. Prior participation as trial counsel, law officer, court member or investigating officer precludes review by that staff judge advocate or legal officer.

Only the President, the Secretary of Department, the convening and supervisory authorities have the power to suspend sentences.

Boards of Review.

The Code has given the boards of review the power to determine matters of law and in addition has vested in them the power to weigh evidence, judge the credibility of witnesses, and to determine controverted questions of fact. The boards are limited to a consideration of matters within the entire record in their review of findings of guilt. Matters dehors the record will not be considered even though beneficial to the accused. Exception is made to this limitation, however, whenever jurisdiction or the sanity of the accused is in issue. It should also be remembered that the entire record includes all of the matters considered by the convening authority whether arising at the trial or elsewise. No matter outside the evidence admitted on trial may be resorted to, however, for the purpose of sustaining a conviction.

The Court of Military Appeals has held that if all reasonable men would conclude that a fact was established beyond a reasonable doubt a board of review would err, as a matter of law, to conclude otherwise. A concurrence with a view which all reasonable men would be compelled to share leaves the board decision untouchable upon further review. In an area between these two positions is one where reasonable minds would differ. A board may resolve such a conflict either way, without abuse of the discretion reposing in it. By pluralizing the reasonable man, the Court has placed itself in the anomalous position of saying that a given set of facts, as a matter of law, may be sufficient to sustain a finding of guilty,

while the same facts at the same time may be insufficient.

Any action taken by a board of review other than outright approval of the guilty finding and sentence or the granting of a new trial inures to the benefit of the accused. A board cannot increase the severity of a finding or of a sentence. If granted a rehearing, the accused cannot be tried for an offense greater than that charged at the original hearing, nor can he receive a sentence greater than that adjudged at the first trial.

Boards of review may look beyond the actual record of trial or the entire record for matters in mitigation of a sentence. The accused cannot complain if such consideration embraces matter adverse to him.

Whether delineated as appropriateness of the sentence, mitigation, or clemency, boards of review are charged with determining what portion of a sentence should be approved against the particular accused in the light of the entire record and all of the surrounding circumstances.

The Court has determined that Congress intended to grant boards of review the power to reduce a sentence to death to one of life imprisonment upon the reduction of a finding of guilty of premeditated murder to unpremeditated murder. Such action amounts to a commutation of sentence, a power not otherwise available to the boards.

The Court of Military Appeals.

The Court of Military Appeals and the boards of review are creatures of statute, and their powers are limited to those which Congress expressly granted or implied. The Code provides that the Court shall take action only with respect to matters of law. The Court, on innumerable occasions, has consistently held that Congress vested power in the boards to make factual determinations and to consider the appropriateness of sentences whereas the Court was not granted such powers. The author is firmly convinced that the inherent powers vested in appellate courts generally are well within the implied powers contemplated by the Congressional grant of the Code. By the test of the plural of a reasonable man, the Court has placed unnecessary restriction upon the powers exercised by it. The difficulties in drawing fine lines of distinction between matters of fact and matters of law have long plagued all courts. The Court of Military Appeals has compounded the difficulties which would confront them in any event by their own limitations.

The Court does have the power to reverse the decision of a board of review whereby the board has set aside a finding of guilty as incorrect in law. A rehearing ordered under such circumstances does not constitute double jeopardy. The Court has not determined the power of the Court to reverse a decision of a board whereby the board has set aside a finding of guilty based upon an insufficiency of the facts. It is submitted that sufficiency of the

evidence is always a matter of law. There should be no reluctance to reverse the decision of a board of review upon such grounds.

The certification of questions to the Court, by the service Judge Advocates General, does in effect give the Government a right of appeal from the decisions of the intermediate appellate body, the board of review. This right is not new to the Federal appellate system.

The Court has considered affidavits setting forth proceedings at the trial which had been omitted from the record on the theory that certificates of correction do not provide the only method for presenting the missing matter. The transcript of a pretrial conference was also considered by the Court in support of alleged command control, exercised over the trial court, which substantially prejudiced the accused. The cases show a considerable divergence of opinion as to whether a motion for new trial or corrective action of the record itself is the more appropriate procedure in this area. From the latest expressions, it appears that the Court will look outside the record whenever they deem it necessary to prevent an injustice.

The power to determine the appropriateness of a sentence has consistently been held to lie with the boards of review and not in the Court. Certainly the Court does possess the power to determine, as a matter of law, whether or not a board of review has properly performed its function. There can be little objection to this result. If the Court does actually lack the power to reduce a sentence when it has set aside part of the findings without

returning the record to a board for the reassessment of a sentence, Congress should be requested to adjust the Code. It is hardly conceivable that Congress would intend to repose more power in an intermediate appellate body than it saw fit to confer upon the highest appellate agency. The dissenting opinions of Chief Judge Quinn support the proposition that Congress has given the Court the necessary power to adjust sentences. The same reasoning would permit the Court to suspend sentences for probationary periods.

There can be little doubt but that the Court may look beyond the record of trial in determining matters of insanity or issues involving jurisdiction. If mental capacity and responsibility have been fully litigated, neither a board of review nor the Court are obliged to relitigate that issue. The Court will consider insanity arising after the trial. This, of necessity, requires the consideration of matter which are not a part of the record. The Court holds that post trial insanity shall stay the appellate proceedings. The Chief Judge dissents from this holding and would complete the review. If appellate reviews were actually limited to the record of trial in every case, there would be little reason to support the stay theory. Certainly, no insane person will be executed. If a prisoner serving confinement becomes insane, he will be given proper treatment. If an accused has been found guilty upon insufficient evidence, thereby causing him to break down or become insane, why should the error not be corrected with

the utmost dispatch? Such remedial action might have tremendous therapeutic value.

CONCLUSIONS.

The scope of this treatise has been much too narrow to be considered as a review of military justice under the Uniform Code.[213] It has been broad enough, however, to prove rather conclusively that there is very little possibility that an innocent serviceman is at all likely to be unjustly convicted or that he will be unduly punished.

In spite of the rather critical analysis which has been made of certain cases decided by the Court, herein, there can be very little argument over the outstanding work which the Court has done. Seven volumes of published decisions are now available to the practitioner of military law. They cover practically every phase of criminal law: Evidence, Procedure, and Appellate Review, as these subjects bear upon military justice. Starting as a newly created entity in 1951, a herculean task has been accomplished in arriving at workable concepts of law within the framework of the Code and the Manual. These have been tailored to accommodate the problems peculiar to the various branches of service. The author continually marvels at the judicial achievements of the Court.

213 Rear Admiral Chester Ward, The Judge Advocate General of the Navy, writing in 1953, gives a comprehensive evaluation of the working of the Code based upon eighteen months of observation after its implementation. See Ward, UCMJ DOES IT WORK? 6 Vanderbilt L. Rev. 186 (1953). Also Fedele, Appellate Review in the Military Judicial System, 15 Fed. B. J. 399 (1955).

The only oath which the soldier, sailor, Marine, and airman takes upon entry into military service is to uphold the Constitution of the United States and to support the Government of the United States against the enemies, both foreign and domestic. This being the sole function of the Armed Forces, their adherence to higher standards than those generally demanded of the civilian populace should be required. In reaching those standards, however, the very thing the military man protects must not be destroyed. The principles of that Constitution which he protects must also be made to protect him. The Government which he protects must insure that his rights as an individual are also protected. By the same token, should he transgress against his Government, he must be justly punished. No other system of jurisprudence has ever clothed an accused with greater protection than that provided by military justice under the Uniform Code. It is a workable system. All of its problems have not been solved. It is a dynamic system. Able lawyers and jurists devote their best efforts to the solution of new problems as they arise. It is always possible to nit-pick over trivialities within any system. The Uniform Code as it is being administered provides a nice over-all balance between the organized discipline of the military service and the rights of an individual accused.

Leadership and training are the foundations upon which discipline is built and maintained within any organization or society. Military law is but an adjunct to the enforcement of discipline within the military society, but it can never successfully serve

as a substitute for leadership and training. During the past several years, practically every physically fit young man in America has had some service in the Armed Forces of the United States. Most of these men are very young. Many are away from their homes for the first time. Each branch of the military services in which these men may serve owe them something akin to a parental duty. It is a duty to lead and to train to the end that there is a willing compliance with the rules and regulations. Enforced obedience fails to accomplish the same purpose. Yet during the calendar year of 1956 Army boards of review considered 6405 general court-martial cases; Navy boards reviewed 1832 general court-martial records and 3428 special court-martial plus 365 cases forwarded from field activities. Air Force boards reviewed 1336 general court-martial and 2087 special court-martial plus 325 cases from field activities. Of these cases, 810 Army, 248 Navy, 453 Air Force, and 4 Coast Guard cases were presented to the Court of Military Appeals on petition by the accused. A total of 27 cases were presented to the Court by certificate for a total of 1542 cases reviewed by the Court.[214] Most of these cases involved sentences which included some form of punitive discharge. Is discipline to be maintained by discharging the recalcitrant? In time of war or national emergency, many men desire to avoid the hazards of military service. Those discharged with punitive discharges during

[214] Annual Report of the United States Court of Military Appeals, 1956.

peacetime are practically immune from future service. This leads to a conclusion that the workability and fairness of military law may not provide the only keys to effective discipline.

From several years of experience in law enforcement, both civilian and military, the author has come to some rather definite conclusions. The first of these is that the quantum of punishment is the least important factor. The second is that the standard of discipline is going to be in direct proportion to the speed with which it is administered, providing justice is done. Applied to the present appellate system which has been under consideration, the third conclusion is that the transcription of the complete record and automatic appeal which accompanies every punitive discharge, whether suspended or not, is a luxury which the military can ill afford in peacetime. There are not enough court reporters in the United States to commence to transcribe, in full, the judicial proceedings which take place daily in this country. With rare exceptions, the civilian defendant must pay for so much of a transcript of trial proceedings as may be required should he desire to prosecute an appeal from a lower court conviction. The military provides an accused with a copy of the transcript and with defense counsel at no expense to him. Of the total of 1542 cases filed in the Court of Military Appeals in 1956, 1390 petitions for grant of review were denied and only 102 were granted. The percentage of meritorious cases would appear, therefore, to be rather low. The cases in which petitions were sought in Court were again a very small percentage of the total number reviewed by

the boards of review. It is very doubtful that many of those convicted would have desired that their cases be appealed to the boards of review. The great bulk of court-martial cases do not result in punitive discharges or confinement in excess of six months. These cases, of course, do not reach the boards of review. They are reviewed by the convening authority with the advice of his staff judge advocate or legal officer and then reviewed again by a supervisory authority who again has the advice of a staff judge advocate or a law specialist. Too many trained and qualified lawyers are awfully busy telling other people what mistakes were made in the trial of cases for which the proceedings should never have been transcribed. Unless the accused himself thinks that some injustice has been done to him, why should there be any appellate procedure? Most men who have done wrong, been caught at it, brought to trial, given a fair trial without delay, and given a reasonable punishment will not complain. This must be done while the man feels some remorse for his acts or the effect is lost. If the accused has been dealt with justly, he is probably quite anxious to pay his debt and is not too much concerned with the delays which accompany the preparation of the record of trial and its review. In addition, a great many man hours are lost while this process is taking place. The accused is not much concerned that trial counsel asked a leading question or that some hearsay testimony inadvertently crept into the record. The cases which have been presented will illustrate the point being made. The Zimmerman

case, supra, was before boards of review three separate times and was twice before the Court. There the accused pleaded guilty to an unauthorized absence of ten days and missing the movement of his ship. He was sentenced to a bad conduct discharge and confinement at hard labor for three months. Although the date of the offense is not shown, the first case before the Court was decided on February 7, 1952, having been certified to the Court on November 30, 1951. The second Court opinion was rendered on October 6, 1952, and had the effect of sending the case back to the board of review, nearly a year after the first certification. The accused became a victim of the automatic system of review.

RECOMMENDATIONS.

1. It is recommended that the Manual be changed to provide that courts-martial be prohibited from imposing any fixed sentence which includes a punitive discharge or confinement in excess of six months, but in lieu thereof impose an indeterminate sentence providing a minimum and maximum penalty in accordance with the gravity of the offense or offenses upon which the sentence is to be based. A separate sentence should be assessed upon each finding of guilt, thereby making it possible for appellate bodies to sever any portion of the sentence based upon a disapproved finding. A parol authority should be created for the purpose of determining actual servitude and ultimate disposition depending upon the circumstances of each case.

2. Secondly, it is recommended that boards of review be deprived of authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact in their consideration of the record of trial and their power of review limited to matters of law.

3. Thirdly, it is recommended that the record of trial contain only the trial proceedings with the evidence adduced thereat but include no allied papers.

4. Fourthly, it is recommended that boards of review and the Court of Military Appeals be specifically empowered to reduce sentences adjudged to any lesser form of punishment as might be made necessary by a reduction of findings and that the Manual be so modified as to clearly spell out the degrees of punishment expressly delineating which are lesser and which are greater in relation to each other.

5. Lastly, it is most sincerely and earnestly recommended that the present provisions of the Code and the Manual providing for automatic review by boards of review be repealed. As a substitute, it is suggested that the present practice of reporting or recording the proceedings and testimony of all trials by either general or special courts-martial be continued; that the accused, within ten days after the pronouncement of findings against him, be permitted to request, without any specification of reason whatever, that his case or some particular portion thereof be reviewed in accordance with the present procedure for

review, but without regard to the enormity of the sentence which may have been imposed upon him; that then and only then shall a transcript of the record of trial be made; and that in the absence of such request the sentence be considered final and ordered into execution.

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UNITED STATES COURT OF MILITARY APPEALS CASES

OTHER CASES

WRITER'S CONTRIBUTION

Very little has actually been written concerning the appellate processes of military justice. Decisions of the Court of Military Appeals, therefore, provide the most authoritative source. It has not been possible to cover the entire field of appellate review in this thesis. The author believes, however, that he has been able to consolidate a greater amount of information regarding the background and historical development of the present system than is presently available in any other single publication. An understanding of this background is essential to any comprehensive study of the system itself.

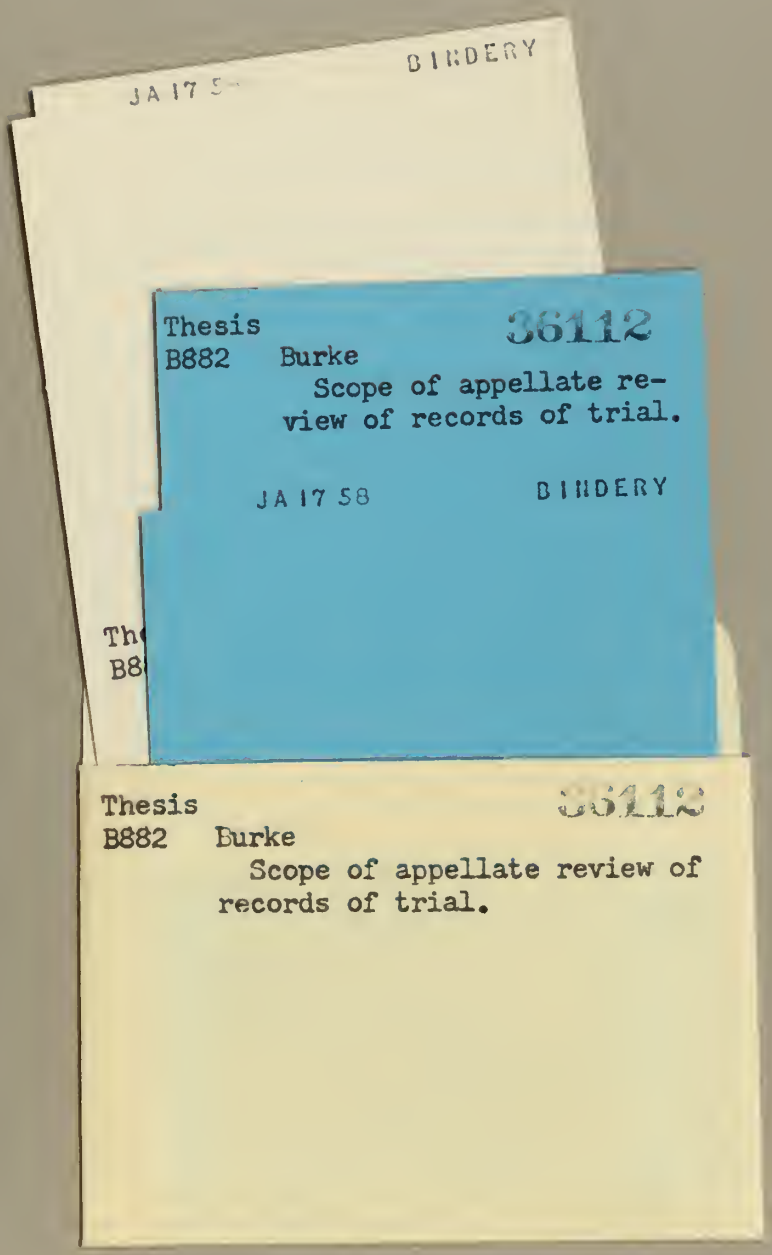
In general, the Court cases dealing with the authorized scope of review and the limitations thereon have been rather exhaustively reviewed. The purpose of this review has been to present a summary of the system to the legal profession as a whole. In making this summary, an effort has been made to acquaint the reader with some of the peculiar problems which have arisen but in such a manner as to minimize the necessity for individual research by the reader.

The author has presented what he believes to be satisfactory solutions to some of the problems which have been encountered. It is hoped that these suggestions may serve to interest other writers in offering their thoughts and solutions whether in agreement or disagreement with this writer's view. It is most sincerely believed that the number of officers, lawyers, and reporters presently required to administer military justice is far too great to be

practical. It is believed that the conclusions and recommendations presented are such as to provoke serious thought among students of law relative to some means of creating a more efficient appellate system. There can be little question but that mobilization for total war would make some change imperative.

Considerable thought was given to the possibility of substituting trials de novo in higher tribunals for the present system of automatic reviews. It is quite possible that a better solution may lie in this area than those which are proposed herein.

The author will be highly gratified if this work serves to aid civilian attorneys and newly commissioned officer-lawyers in the military in gaining an insight and understanding of the present system without duplicating the effort and research which would otherwise be required.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